DEFENDANT'S EXHIBIT No. 5.

CERTIFIED COPY.

Opinion No. 1383.

Before the
INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY,
v.
PENNSYLVANIA RAILROAD COMPANY.

Submitted January 25, 1909. *Decided March* 7, 1910.

REPORT AND ORDER OF THE COMMISSION.

1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.
2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine can not be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore *Held,* That the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars, is unlawful and discriminatory.
4. The defendant's contention that, so long as the petitioner receives all the coal cars it is entitled to, it has no right to complain because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratably better at the hands of the carrier.
5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and *Harry White* for complainant.
Francis I. Gowen, George V. Massey, and *Murray & O'Laughlin* for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the Commission may best be expressed, the petitioners bring to our attention the method or rules

in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the Commission requiring the defendant so to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because, when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the Commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the Commission to control and enter orders in respect to the practices of interstate carriers in such matters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since

the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio v. H. V. Ry. Co.*, 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the Commission in *Traer v. C. & A. R. R. Co.*, 13 I. C. C. Rep., 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the Commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar complaints by the same petitioner against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceed-

ings in the United States circuit court for the northern district of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the Commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they related to the cars employed by the complaining carriers in hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was prosecuted by the Commission and the whole question was considered by that tribunal in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, and *Interstate Commerce Commission v. C. & A. R. R. Co.*, 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the Commission had previously held in *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the amended act to regulate commerce, and as such was a matter within the regulative power of the Commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own use, are instruments of interstate commerce as fully as are its system cars in which commercial coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distinction that must necessarily be observed by the courts between the power to regulate

and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other federal court, the right to usurp the purely administrative functions of the Commission by substituting a regulation that the court might deem wise for one which it considered the Commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the Commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

It thus appears that the orders of the Commission with respect to the distribution of coal cars by intertate carriers, as expressed in the several cases referred to, remain unaffected by the attacks that have been made upon them in the courts. And our further consideration of these questions in connection with this group of cases has confirmed our conviction that the general principles underlying the disposition made of the previous cases are both sound and just. We shall therefore proceed to ascertain what has been and is now the practice of the defendant in respect to the distribution among coal operators of its available coal-car equipment, and how far it differs, if at all, from what the Commission has regarded and, in the cases referred to, has announced as the just and equitable basis of distribution. It may be well, however, first to say a word in respect to the method or basis in effect on the lines of the defendant for assigning to each of the coal mines that it serves a daily output rating for determining its proportion in the distribution of coal cars, that being one of the practices of the defendant of which complaint is made by the petitioner herein, as well as by the petitioners in the other cases in this group.

In *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, it appeared that the method of rating mines adopted by that carrier involves two principal

factors, (*a*) the physical capacity of the mine, and (*b*) its commercial capacity. The physical capacity is ascertained in the manner explained in our report of that case (*id.*, p. 93) and the method need not therefore again be described. It will suffice to say that it is substantially the plan now generally followed by coal-carrying roads. The commercial capacity, or the requirement of a mine for cars as tested by its actual shipments is arrived at by taking the volume of the shipments made by a mine during a period of free-car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. The three figures, expressed in coal tons, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and the sum is divided by three. The result is the capacity basis that is established by the Baltimore & Ohio for determining the percentage of the available coal equipment that the particular mine is entitled to receive during any period of car shortage. After a careful consideration of the system as applied to interstate shipments, we were inclined to think and so intimated (*id.*, p. 96), that a method of rating coal mines based upon a combination of their physical and commercial capacities more closely approximates their actual car requirements than a system based upon physical capacity only.

But in this petition the complainant, as we understand its attitude, demands that the commercial capacity of the mines served by the defendant shall be eliminated as a factor in fixing their rating and that their physical capacity shall be accepted as the sole factor for determining their respective proportions in the distribution of coal cars. The defendant, while combining the physical with the commercial capacity, does so in a way that differs somewhat from the plan in effect on the Baltimore & Ohio. To the physical

capacity of a mine it adds its commercial capacity for one year only and divides the sum by two. The commercial capacity, however, is not based upon shipments made from a mine during a substantial period of free-car supply, as is the case on the Baltimore & Ohio, but upon the entire volume of shipments made from the mine throughout the preceding twelve months. The ratings are revised quarterly on February 1, May 1, August 1 and November 1; the rating of any particular operation will also be revised by the defendant upon request regardless of the quarterly tests. In other words, the commercial capacity of each mine is brought up to date at each quarterly rating period by taking into consideration its new tonnage for three months and adding to it the tonnage of the preceding nine months previously used in the preceding rating. In this manner the defendant endeavors to follow up as closely as possible the fluctuations in the market, labor conditions, and car supply. By combining the commercial capacity of a mine, thus ascertained and constantly brought up to date, with its physical capacity, the rating of the mine in the distribution of coal-car equipment is determined. And if this system of rating is equitably applied to all mines served by the defendant we are unable, so far as our investigations to the present time have informed us on the question, clearly to see upon what grounds it may be said to result in an unequal, unfair, or discriminatory distribution of its equipment.

But, as heretofore stated, the complainant insists that the physical capacity of a mine is the sole and only proper basis for determining its rating for purposes of car distribution. The economic waste involved in a system that leads operators to develop their mines beyond their commercial requirements and for the sole purpose of increasing their percentage of coal-car supply was discussed in *Rail & River Coal Co. v. B. & O. R. R. Co., supra.* While an order of the Commission in a particular case must necessarily fix the rights of

the parties to the proceeding, so far as past shipments are concerned, and must necessarily restrain, until our further order, the continuance of the rate or practice that we condemn, and compel the carrier to observe the rate or practice that we prescribe for the future, these great questions of transportation are not foreclosed of further discussion and consideration upon further complaint. Additional experience with the actual operation of rules that combine commercial with physical capacity in the rating of coal mines for car distribution, may throw new light upon a matter that has vexed the Commission as well as many carriers that have endeavored to do equity as between different mines on their lines; and if so, we shall not hesitate to modify what has been said here and in other cases before us on that question. The principle of *stare decisis* has little application in proceedings before us involving questions of this nature. But at this time and upon the present state of our information and experience in the matter we can not accept the complainant's contention that physical capacity alone is the fair and sound basis for rating mines for car distribution. Speaking in precise terms, it is of no real concern to a carrier how large a particular mine may be and what are its possibilities in the way of daily output, except as those factors may afford some measure of what its actual shipments will be. The utmost obligation that the law lays upon the carrier is to equip itself with sufficient cars, not to meet the hopes and expectations of the owner of a mine as expressed in its physical development, but to meet his actual shipments. A mine rating that is adjusted to the expectations of the operator and altogether ignores his actual requirements might easily result, in a period of car shortage, in giving him cars for every ton of coal that he can actually dispose of, while an adjoining mine, with a small development but a larger demand for its output, would get but a fraction of the equipment that it needs to meet its actual contracts.

In *Powhattan Coal & Coke Co. v. N. & W. Ry. Co.*, 13 I. C. C. Rep., 69, the record showed that thousands of dollars had been expended in the erection of additional ovens, not for actual use or to meet any commercial demand for more coke, but solely for the purpose of securing additional cars in the distribution by the carrier of its equipment during car shortage periods; and we there condemned a rule for the distribution of coke cars that ignored actual shipments and was based solely on the number of coke ovens that had been erected by the different coke companies. Nothing has since developed, or was suggested in this proceeding, to change our view on the general question, and the complainant's contention that physical capacity is the fair and reasonable basis for rating mines for car distribution must therefore be dismissed as untenable.

We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by

their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in *Logan Coal Co. v. P. R. R. Co.*, 154 Fed. Rep., 497, 498, where the court says:

> To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent. of the output. Assume that one operator has individual cars available on that day for the shipment of 200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent. of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent. of which is 210 tons, for the transportation of which he will receive company cars, so that the operator with the individual cars will be able to ship on the day instanced 410 tons, as against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times.

The results arrived at by the court in its illustration seem to us not quite accurate, in that the total car

capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent. as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent., which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the Commission's rule each mine under these circumstances would have been able to ship 450 tons.

Using the same two mines with an assumed capacity of 500 tons each day and available equipment with a total capacity of 70 per cent. or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which this Commission has approved in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.* and *Traer v. C. & A. R. R. Co., supra,* would result in giving the latter mine its individual cars of 200 tons capacity and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would

then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating for the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equipment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent. more coal than its competitor, while under the rule approved by the Commission the shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars consigned to a particular mine, the court in *Logan Coal Co. v. P. R. R. Co., supra,* said, p. 503:

> The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: *United States ex rel. Coffman v. N. & W. Ry. Co.* (C. C.), 109 Fed. Rep., 831; *United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al.* (C. C.), 125 Fed., 252; *W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co.*, 134 Fed., 198, 67 C. C. A., 220; *United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co.*, 143 Fed., 266, 74 C. C. A., 404; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St., 130, 23 N. E., 928; *United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al.*, 154 Fed., 108.

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (*supra*) the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent.
System cars for company coal	21
Foreign cars for supply coal	6
Individual cars	45
System cars for commercial coal	25
Foreign cars for commercial coal	3
Total	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent. of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent. were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant

will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainants second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adapted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

In view of our finding herein that the practice of the defendant in not counting assigned cars against the ratings of the mines has been discriminatory and has resulted in injury to the complainants in this group of cases, it is suggested that it will not be fair or equitable to content ourselves with the condemnation of that practice and the entry of an order requiring a different practice for the future; such a course, it is said, will leave the complainants under the disadvantage that the practice has wrought in the past, while giving to the favored mines the results that have wrongfully accrued to them. In other words, it is said that, under the rules here condemned, the preferred mines have been able year by year to enlarge their commercial output while the commercial output of the complainants and others has been restricted; and that justice requires that there shall be a new point of departure, at least for the present, based solely upon the respective physical capacities of the mines on the lines of the defendant. Exact justice is ordinarily not attainable. It is difficult no less for this Commission than for a court to deal with such a situation as this with mathematical accuracy. The most that either may hope to accomplish in such a state of facts is to do substantial justice; and this we do, so far as it seems to us possible, when we require the defendant to adjust its rules on a proper basis for the future, and give to the complainants the opportunity to have their

injuries redressed in the form of damages. While the tendency of the prior rules must have been to enlarge the commercial capacity of the preferred mines, we can not doubt that their physical capacity has also been enlarged. And we have no assurance that an order requiring the defendant, for the present as suggested, to distribute its cars on the basis solely of physical capacity would not, in some cases at least, work very substantial injustice.

That the practices of the defendant with respect to the rating of mines and the distribution of coal-car equipment were, to some extent at least, in a loose and unsatisfactory condition prior to 1905 not only appears in this record, but in the record of the coal and oil investigation made by the Commission under the joint resolution of the Congress approved on May 7, 1906. There seems at that time to have been a more or less well-defined policy on the part of the defendant to discourage the opening of new coal operations. But just how far this condition of affairs, prior to January 1, 1906, when the new regulations went into effect, may adversely have affected the complainant in a financial sense it is impossible upon this record to say. The increasing price received for coal in the general markets suggests the possibility that the coal not mined at that time may subsequently have been mined and sold to the complainant's advantage. There are one or two other matters, however, of which complaint is made and to which it may be well here to refer.

The evidence shows that quite frequently, just how often not appearing, cars were placed at the mines of the petitioner too late to be loaded on that day, and one of the complaints made in the petition is that prior to January 1, 1906, the defendant charged such cars against the complainant's allotment not only for the day on which they were so placed but also against its allotment for the following day. It is even said that the complainant's mines were charged with cars placed

there during the night. At the time in question, whatever may now be the case, it was the custom of the miners to enter the mines at 8 a. m., and under the rules then in effect, if cars were not on the siding ready for loading at that time but were received later during the day they would not be loaded until the next day. It does not appear just what the defendant's system was prior to January 1, 1906, with respect to the counting of cars placed at the mines for loading and not loaded until the following day. But the distribution sheets after that date contained a rule as follows:

> A car placed too late for loading will not be counted as available for loading until the following day. A car available for loading and not loaded will be counted each day in column headed "Empty cars over" until loaded or otherwise disposed of. A car loaded and not consigned will, unless consigned on the unloading day, be counted each day in column headed "Unconsigned loads over" until consigned.

No claim is made upon the record that this rule, which seems still to be in effect, does not give fair results or that there is any discriminatory practice being carried on with respect to this phase of car distribution. So far as concerns the defendant's practice before that date there seems to be no indication of any discrimination in this respect against the complainant in this or in the cases that follow it; nor is there any evidence that other mines were unduly favored in that regard.

It also appears that at an expense of about $5000 the complainant had constructed a tipple at its mine No. 2 and also a siding connecting it with what is known as the "Fuller Run tracks," a road about one mile long extending from the defendant's line to mines from which shipments had been made for a number of years, but which at this time seem to have been closed. From

its mine No. 2 the complainant was ready to make shipments in April, 1903, but the siding, as it asserts, was spiked down by the defendant and kept in that condition for about nineteen months. Requests were made by the complainant from June 28 to July 31, 1903, for cars enough to ship 100 tons of coal per day from that mine. But no cars were furnished by the defendant until January 17, 1905, and then only after mandamus proceedings had been instituted in the courts. The defendant's failure to supply cars for that mine, while supplying cars to other mines in the district, is one of the discriminations alleged in the complaint. What reason it had for refusing or failing to set cars there is not satisfactorily explained of record. But for some reason also not explained the complainant allowed the matter to rest in that condition for many months without taking any steps against the defendant and without even renewing its demand for cars so far as the record discloses. It is not clear, moreover, that the alleged closing of that siding by the defendant can fairly be regarded as a basis for a charge of discrimination; it has more the character of a tort or a wrongful violation of the defendant's general duty to the complainant as a common carrier for which an appropriate action in the courts would doubtless lie to recover any damages thus sustained.

It is also asserted by the complainant that its mines were unfairly rated when compared with the ratings assigned to other mines in the same district and that as a result of this discrimination it suffered substantial losses. Although it appears that the capacity assigned in 1903 to certain of the mines of Williams & Company in the same mining district was greater than that established for the same mines in 1906 after a more accurate system of mine rating had been devised, the proof is not sufficiently clear to permit of a definite finding of a discrimination against the complainant in that respect. It does appear that prior

to January 1, 1906, the rating assigned to mines in the nine coal-mining districts on the lines of the Pennsylvania were made, with the approval of the general superintendent, by division superintendents upon the general information of the latter officials, derived from observation and their general knowledge, and not upon any definite principle or plan for rating mines. The ratings, therefore, varied in accordance with the information and ideas of the different superintendents. We do not in fact understand the defendant to claim that there was any real system of mine rating in effect at that time. This lack of system was indeed characteristic of other large coal-carrying lines at that time, as is shown in the report of this Commission to the Senate and House of Representatives in the investigation to which reference has just been made.

The defendant meets this point by asserting that the real question to be determined is whether the complainant received less than its proper share of the cars distributed by the carrier during periods of scarcity of equipment and that it is not material that some other coal operator may have received more than his quota of available cars. In other words, the contention is that so long as the complainant received all the cars it was entitled to it has no right to complain that some other coal shipper, as the result of a high mine rating or otherwise, secured an excessive proportion of the available cars, if this preference was not at the expense of the complainant. We must reject that view. The act to regulate commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no one else shall fare ratably better than he does at the hands of the carrier. It may be true that a court would not allow the complainant damages for losses due to the defendant's failure to furnish it cars that it was not entitled to receive, but this Commission may surely require an

interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive.

But upon this part of the case the complainant's own witnesses do not sustain it to the full extent of its contentions, and we can only express the general impression that neither in its rating nor in its car supply did the complainant fare as well at the hands of the defendant as it possibly should have done. We find it impossible, however, to arrive at any clear or accurate statement of the extent of the discrimination. Williams & Company, its chief competitor in that district, received many more cars than the complainant and their mines enjoyed a higher capacity rating than was assigned to the mines of the complainant. They sold large quantities of coal to the defendant for use in its locomotives, and these cars were not counted against Williams & Company. While there was doubtless some discrimination in these matters, as there certainly was in the defendant's failure to count its own fuel cars against those mines, it is difficult, if not impossible, to assign definite boundaries to it and to say at this time what should have been the rating of the respective mines and what should have been the proportion of each in the distribution of the defendant's coal-car equipment.

It is suggested that under its corporate charter, granted by the State of Pennsylvania, the defendant is not only a common carrier or transporting agency, but that its rails are at the same time a public highway, and it must therefore haul loaded or empty private cars for their owners upon reasonable terms. There is in its charter some language to that effect; and in *Boyle v. P. & R. Ry. Co.,* 54 Pa. St. Rep., 310, cited by counsel for the defendant on the argument, the Supreme Court of Pennsylvania held that a similar charter of another company in that state contemplated such a dual use of the road, by the company itself as a carrier in transporting the freight of shippers and by

the owners of cars as a public highway substantially in the sense that a canal or turnpike is a public highway. Counsel, therefore, contends that the dual capacity in which the defendant is required to serve the public, as shippers and as car owners, necessarily eliminates from the case the argument that individual cars or private coal cars must be treated as railroad-system cars for purposes of allotment or distribution. It is urged that private cars may properly be counted against the mine owning them only in the manner and to the extent that the defendant's present rules take them into account in periods of car shortage.

Without entering upon any discussion of the extent to which the terms of a charter granted to a carrier by a state may control or limit the performance of its functions and obligations as an agency of interstate transportation, it will suffice to say that in none of its decisions relating to coal-car distribution has the Commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators. As the Commission has made no ruling that conflicts with the rights and obligations arising under the defendant's charter as construed by the state Supreme Court, we need not, and do not, here consider what the situation would be if the terms of its state charter required the defendant carrier in the distribution of its coal-car equipment to work an undue discrimination against an interstate shipper in violation of the act to regulate commerce as amended.

The petitioner in this complaint bases its claim for damages on the amount of coal that it might have mined, if the defendant had furnished it with a sufficient supply of cars to enable it to work its mines twenty days a month during the period covered by the complaint. It also claims that the cost of mining the coal actually taken out during the period in question was higher than it would have been had the defendant furnished it with an adequate supply of cars, thus enabling it to operate its mines to the best advantage by running them regularly and to their full capacity. In making up the amount of its claim the petitioner excepts a period of four months during 1906 when its miners were on a strike and takes the average selling price of coal during the remainder of the period covered by the action. It deducts as the cost of mining an amount per ton that is estimated as the probable cost had the defendant furnished the complainant with cars enough to enable it to run its mines at full blast and with the regularity that produces the best results. Upon this general basis the complainant asserts that it has been damaged as the result of the alleged discriminations against it by the defendant in the sum of $127,855.65, and for this amount it asks an award at the hands of the Commission.

The complaint herein was filed before our decision in *Joynes v. P. R. R. Co.*, 17 I. C. C. Rep., 361, was announced. In that proceeding damages were demanded for losses alleged to have been suffered in the decay of the complainant's fruit by reason of an alleged discrimination against him in favor of other dealers in fruit to whom the defendant, as the complainant contended, had given a preferred use of its unloading platform, thus delaying his shipments until the fruit was spoiled. We held, upon grounds that are there fully stated and need not be repeated here, that while the Commission was competent to find that a discrimination had been practiced, the measurement or ascer-

tainment of the damages the complainant had suffered in consequence thereof was a judicial question for the courts and not for the Commission; the view expressed was that the only damages that may be assessed by the Commission under the amended act were rate damages or damages that could be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought lawfully to have been charged; and that the complainant's remedy for the damages in compensation of the loss suffered in the value of his fruit was in the courts.

That case differs from this in that it involved a single wrong in the nature of a tort against a particular shipper, while this case in its larger aspect involves the validity of a rule for car distribution applicable alike to all coal shippers on the line of the defendant and resulting, as we have pointed out, to the benefit of some shippers and to the injury of others. We have found that in the particulars herein explained, discrimination was practiced, and have held that for such damages as resulted the complainant is entitled to recover from the defendant. As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices, and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the Commission is divided as in the case to which we have just alluded. The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts. At the most any finding by the Commission as to the amount of damages would be the expression of an opinion that could not be enforced by the Commission and would have no conclusive and binding effect upon the court to which, in any event, resort must be had by the complainant for a finding and judgment in the usual manner required by fundamental law. The minority, con-

ceding some of the difficulties to be encountered in dealing with such matters, nevertheless interpret the law as necessarily casting that burden upon the Commission.

Since our decision in *Joynes v. P. R. R., supra,* was announced, our attention has been called to an opinion by Judge McPherson of the United States district court, sitting in the circuit court of the United States for the eastern district of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.,* 176 Fed. Rep., 748 (advance sheets of May 12, 1910). That was an action by the coal company against the defendant herein to recover damages in the sum of $250,000 for the sales and contracts that are alleged to have been lost because of the discrimination resulting from the same coal-car distribution rules that are involved in the proceeding now before us. Citing *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,* 204 U. S., 426; *Baltimore & Ohio R. R. Co. v. U. S.,* 30 Sup. Ct., 164; and *Interstate Commerce Commission v. I. C. R. R. Co.,* 173 Fed. Rep., 930, Judge McPherson holds that the Commission and not the courts has primary jurisdiction to award reparation for the general damages of that character that may have resulted from a preferential practice in the distribution of coal cars during a percentage period. The case brings a new element into the situation. That is the court whose jurisdiction this complainant would doubtless invoke in order to secure pecuniary redress for the wrongs which the complainant claims to have suffered as the result of the discrimination we here find to have been practiced against it and others by the defendant. There is possibly no necessary conflict between the view there expressed and a refusal by the Commission to measure the complainant's damages in this case, after having found that a discrimination existed; but there is some danger, in view of the ruling of the court in that case, that justice may be defeated altogether in this case if we

proceed no further with it. We have concluded therefore to order a further argument early in the fall with respect to the amount of damages suffered by the complainant in this proceeding, and by the petitioners in the other cases in this group of complaints, as the result of the discriminations that we find to have existed. Under all the circumstances, this seems the prudent course to pursue. The order of the trial court dismissing the action of the Morrisdale Coal Company, for want of jurisdiction, has been taken for review to the circuit court of appeals; and if our further consideration of this group of cases results in awards of damages to the complainants and they resort to the courts for their enforcement, in case payment is contested by the defendants, the courts will then have the whole question before them and some definitive interpretation of the act with respect to the extent of the authority of the Commission and the courts in this regard will follow, and this is highly desirable for the future guidance of both.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner,* dissenting:

Although I am myself of the opinion that this case has been sufficiently talked about and sufficiently considered, and that it ought to be finally disposed of, still if the majority deems it necessary to hear further argument upon the question of damages, I do not dissent from that course. I do not agree with the holding of the majority that this Commission has no authority to assess and award these damages, and while it is not now proposed to make any order from which I dissent, I wish to express my views upon that subject. To my mind there is a clear distinction between the *Joynes case,* 17 I. C. C. Rep., 361, and the one before us.

Joynes was a fruit merchant located at Pittsburg, whose complaint was that the defendant had systematically delayed the movement and delivery of his

traffic, in comparison with that of his competitors, whereby he had suffered serious damage. The act of the defendant was alleged to be in violation of the third section and the holding of the Commission was that, even if in violation of that section, damages could not be awarded by the Commission. No rate, regulation, or practice of the defendant was involved. The act complained of was personal to Joynes. While it seems to me that under the terms of the eighth and ninth sections of the act Joynes, in a case like that detailed, had a cause of action for the recovery of damages against the defendant which he might prosecute before this Commission, it also appears to me that he might have brought his complaint in the first instance before the court. Had he begun such a suit it would not have been obnoxious to the objections sustained by the court in the *Abilene case*, 204 U. S., 426, or the *Pitcairn case*, 215 U. S., 481.

In the case before us this is different. Here is not a particular discrimination arising out of the conduct of the defendant toward a particular shipper, but rather a discrimination which inheres in a rule of the defendant applicable to all shippers and presumably enforced alike as to all shippers. While the courts might well be invested with exclusive jurisdiction to hear and determine suits like that of Joynes, it seems to me that in the case before us the Commission not only must, under the statute, but should, as a matter of convenience, award damages.

Sections 8 and 9 in my opinion give to the complainant a right of action for damages against the defendant and confer upon it the privilege of applying to this Commission for an order awarding those damages. It is impossible for me to put any other meaning upon the plain language of these sections, which read, so far as material to this question, as follows:

SEC. 8. That in case any common carrier sub-

ject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

Here is a clear statement that in case of a violation of the act resulting in damages to any person the carrier shall be liable for such damages, and an equally explicit declaration that the recovery of such damages may be had either by a proceeding before the Commission or by suit in court; but that both remedies shall not be pursued for the recovery of the same damages.

The reasons of the majority for declining to exercise this jurisdiction, which is explicitly conferred by the ninth section, are stated in the *Joynes case*. It is there said in substance that damages resulting from a violation of the act may be divided into two classes,

"rate" damages and "general" damages. By rate damages are meant those damages which can be ascertained by computation from a reference to the rates of the carriers only. The Commission determines what the reasonable rate ought to be; it determines what rate has been paid; the damages are the difference between the rate exacted and the rate which should have been exacted. These damages the Commission can and should award.

General damages may involve a consideration of all those elements which enter into the determination of damages in other cases. There is no exact measure by which such damages can be computed. To assess them involves the consideration of evidence and the exercise of judgment. For the assessment of such damages this Commission has no greater qualification than a jury. Therefore, it is assumed that Congress, notwithstanding its express language to the contrary, did not intend to confer upon the Commission authority to deal with damages of that character.

In support of this somewhat novel canon for the interpretation of statutes the Commission refers to the action of the Supreme Court of the United States in the *Abilene case, supra,* in which that court held that, notwithstanding the language of the ninth section, by which a claimant is given an election between his suit in court and his proceeding before the Commission, nevertheless, in certain cases, the proceeding must be in the first instance before the Commission and can not be in court. Just as the Supreme Court in that case has read out of the ninth section the right to begin certain cases before the courts, so the Commission now proposes to read out of that same section the right to proceed in certain cases before the Commission.

I can find no case in which the Supreme Court of the United States has ever undertaken to qualify the express language of an enactment upon the ground adopted by this Commission in the *Joynes case.* That

court has repeatedly said that courts have nothing to do with questions of expediency. Whether a statute is wise or unwise, whether it is expedient or inexpedient, whether the object aimed at is reached in the best way or not, are questions for the legislature not reviewable by the courts. The *Abilene case,* as I read it, not only fails to sustain the position of this Commission in declining to accept jurisdiction in matters like that before us, but, upon the contrary, plainly holds, both by necessary inference and by express language, that in a case like the one now under consideration the only tribunal in which complaint can be brought and damages obtained is this Commission. If that be so, it is certainly the duty of the Commission, no matter how inconvenient the exercise of that function may be, to entertain the complaint, determine as best it can the damages, and award those damages by its order.

It should be clearly understood at the outset just what that violation of the act is of which complaint is made and for which damages are demanded.

It is true upon most coal-carrying roads, and was true upon the lines of the defendant during the period covered by this complaint, that in times of an active coal movement there are not sufficient cars to supply the demands of all mines. The amount of business which the miner can do depends upon the number of cars which he can obtain for the movement of his product. To furnish one mine with cars while they are denied to a competing mine means that the favored mine shall do business while the other stands idle. This renders preference in the furnishing of coal cars, a most serious form of discrimination, and makes necessary the establishment of definite and uniform rules and regulations for the distribution of such cars to different operations during the period of car shortage.

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of

cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination. It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine the cars to which it was entitled under the scheme in force; but it applied a system or a practice which in its working out was unjust and discriminatory to the complainant.

The Commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

To my mind there is no distinction between a practice of this kind and a rate. Every reason which requires the Commission to entertain claims of unreasonable rates and to award damages if the claim is sustained, requires with equal force that claims on account of discrimination by the application of general rules and practices of this character should be made in the first instance to the Commission and that damages should be awarded if the practice is found unlawful. If any distinction can be drawn between instances in which the Commission may and may not award damages for a violation of the act, that distinction should be founded, not upon the character of the damage, but upon the character of the act out of which the damage grows. If the thing alleged to be unlawful is a rate, regulation, or practice of general application which

touches the entire shipping public alike, over which the Commission has control, with respect to which it must determine the reasonableness, and as to which it could order the substitution for the future of a different rate, regulation, or practice, then the proceeding for damages must be begun in the first instance before the Commission, and it is the duty of the Commission to ascertain and award the damages. This position is fully sustained by the recent decisions of the Supreme Court.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, is familiar to all and only the briefest reference to it is needful.

The Cotton Oil Company claimed that certain rates imposed by the defendant for the transportation of cotton seed were excessive and brought suit in court to recover the amount of the excess. The transportation was interstate and the rates charged were those established under the provisions of the act to regulate commerce. The railroad defended upon the ground that a rate so established was conclusive upon all the world until changed by the Interstate Commerce Commission; that no suit could be brought either at common law or under the ninth section, but that the complainant must begin his proceeding by filing claim before the Commission.

This contention was sustained by the Supreme Court in a convincing opinion. Said the Court: The fundamental purpose of the act is to prevent preference and discrimination. For this purpose it is required that rates shall be established and notice given to the public in a certain specified manner and that the rate so established shall be collected of all shippers alike. If, now, suit can be brought for a recovery of a portion of this rate in the first instance, either in court or before the Commission, at the election of the shipper, it may follow that one jury will determine one rate to be reasonable, another jury a second rate to be reasonable, while the Commission may be of the opinion

that still a third rate should be charged. This will of necessity produce the very discrimination which the act was intended to prevent. To give such a construction to the language of the ninth section would be to destroy the act itself.

It was held therefore in that case that the only remedy of a shipper for the payment of an excessive rate was to apply to the Commission, which, if it held the rate to be excessive, should order the establishment of a reasonable rate for the future and award damages to the complainant upon the basis of the rate so established.

Let it be carefully observed that this conclusion was not reached because the Commission was an expert body, more competent to determine the reasonableness of a rate than a jury; nor because the rate was filed in its office and under its direction, and could, therefore, be more conveniently ascertained and applied; nor for any consideration of expediency or convenience, but because the opposite holding would accomplish the very thing which the act to regulate commerce was intended to prevent.

This further situation might arise: If a rate has been pronounced unreasonable by the Commission and reduced, or if a rate has been voluntarily reduced by the carrier without any action of the Commission, may a shipper, with respect to a time anterior to the action of the Commission or to the reduction of the rate, maintain a suit in court for the payment of the excessive rate?

Apparently, the same reasoning which leads to the conclusion that application must be first made to the Commission in case of an existing rate would lead to the same conclusion with reference to a rate no longer in effect, for if such suits could be brought in court it might follow that one shipper would in fact pay one rate and another shipper another rate. Such is the conclusion of the court, which, on page 442, says:

> • • • Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And, again, on page 446, the following language is used:

> • • • And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands.

It appears, therefore, that whether the rate to be attacked is still in force or has been superseded by a lower or different rate, the complaint must be addressed in the first instance to the Commission, which is required to determine a reasonable rate and to award damages or reparation upon that basis. Whether, after the Commission has determined that a certain rate should have been charged during a given period, a shipper having paid the higher rate can begin suit in court in the first instance for the recovery of the excess, I express no opinion. It is evident that the discrim-

ination complained of would not arise provided the rate fixed by the Commission could in any way be made conclusive in the suit instituted in court. However that may be, it is clearly the right of the shipper under all circumstances to file his claim with the Commission in pursuance of the provisions of the ninth section, and it is clearly the duty of the Commission, in the opinion of the Supreme Court, to entertain the claim, prosecute the inquiry, *and award the reparation.*

I am unable to see any valid distinction between an excessive rate and a rule or practice for the distribution of coal cars like that involved in this proceeding. In each case the rate or regulation is of universal application. In either case to apply one rule to one shipper and another rule to another shipper must result in preference. In each case the Commission has power to inquire whether the existing rate or regulation is lawful and to prescribe another in substitution for the future. No reason is urged by the court in the *Abilene case* in justification of its holding there which would not apply with equal force in support of a similar holding here. That this must be so is no longer debatable since the decision of the Supreme Court of the United States in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S., 452, by which it was affirmed that the authority of this Commission over a regulation for the distribution of coal cars is exactly the same as its authority over the rate of transportation itself.

The Illinois Central Railroad is a large carrier of coal and establishes, in common with other coal-carrying railroads, rules for the distribution of coal cars, in times of car shortage, between the different mines served by it. Complaint was made to the Commission that the method of distribution in force upon the Illinois Central resulted in unjust discrimination against the complainant. There was no question as to the manner in which the capacity of the mines was ascertained and the percentage to which each mine was entitled

determined, but it was asserted that certain classes of cars were not counted against the assignments of the mines to which they were delivered. In alloting cars the Illinois Central, according to its regulations, did not count private cars which were owned by the mine, foreign railway fuel cars which had been delivered to the Illinois Central by some other railroad for the purpose of being taken to a particular mine, and the fuel cars of that company itself which were used in transporting coal from the mine to the place where it was to be used by the railroad. The complainant contended that all these classes of cars should be counted against the assignment of the mine.

The Commission held with the complainant and made an order directing the Illinois Central to count all such cars in the future. That company conceiving this order to be unlawful petitioned to the circuit court for the northern district of Illinois for an injunction against its execution. Upon hearing that court was of the opinion that the order of the Commission was correct as to private cars and foreign railway fuel cars, but incorrect as to company fuel cars, and an injunction was accordingly issued restraining the operation of the order as to such company fuel cars.

From this the Commission appealed to the Supreme Court of the United States, which reversed the decree of the circuit court and sustained the order of the Commission in full.

The contention before the Supreme Court was that the only order which the Commission could make under the fifteenth section was one prescribing a rate or a rule, regulation, or practice affecting a rate; that this regulation, while the effect of it might be to prevent discrimination, was not a regulation affecting rates and therefore not within the power of the Commission to make. The court held that a regulation of this kind was within the terms of the fifteenth section; that, therefore, the Commission might prescribe the rule

which it did, and that such rule when prescribed would be binding upon the Illinois Central in its relations with all its coal mines.

This case determines that there is no distinction between an order of this Commission fixing the rate for the future and an order establishing a rule for the distribution of coal cars; and this being so, I am utterly unable to see any ground upon which a distinction can be made between the remedy which is open to the shipper for the recovery of damages in the two instances. If he must, in case of the excessive rate, apply to the Commission in the first instance, so in the case of the discriminating practice he must first make application to this body. To permit the institution of a suit in court until the rule has been fixed by the Commission would result in exactly the same discrimination and preference in case of the regulation touching the distribution of cars as it would in case of the excessive rate. It must follow as a necessary inference from this decision that courts are without jurisdiction to entertain in the first instance suits for damages resulting from the enforcement of improper rules for determining the capacity of its coal mines and the distribution of its coal cars in times of shortage between the different mines served. Any possible doubt upon this point has been laid at rest by the decision of the Supreme Court in *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S., 481, decided at the same time with the *Illinois Central case* just referred to.

The twenty-third section of the act gives a remedy through the district and circuit courts of the United States by mandamus in instances where a carrier is granting a preference in the movement of traffic or in the furnishing of cars or other facilities. The Pitcairn Coal Company, claiming that the Baltimore & Ohio Railroad was discriminating in favor of its competitor by the rules which it had established to govern the distribution of coal cars, began proceedings for manda-

mus against that company. It is not necessary to detail the various specifications of preference set forth in that proceeding. The general system of car distribution in vogue on the Baltimore & Ohio was analogous to that established by the Illinois Central, and the grounds of complaint, while more numerous in this case than in that, had mainly to do with the failure to count different classes of cars.

After an elaborate hearing upon the facts the circuit court sustained the contention of the relator, the Pitcairn Coal Company, upon a single item, denying in the main the prayer for relief. Upon appeal by the Pitcairn Company, the circuit court of appeals reversed the court below and held that the relator was entitled to the relief prayed for. The Supreme Court of the United States, upon appeal by the Baltimore & Ohio Company, decided that the circuit court had no jurisdiction under the twenty-third section, and that the suit should be dismissed. It placed its decision entirely upon the *Abilene case,* pointing out that there was no distinction between a rule or regulation of this character and a rate, and that therefore suit should have been begun in the first instance before the Commission.

It is therefore now determined beyond controversy that the complainant in the case before us could not at the time this complaint was filed have commenced in court, either at common law or under the twenty-third section, or under the ninth section, a suit at law, for a correction of the discriminations complained of or the recovery of the damages incident upon those discriminating practices. It must have applied to this Commission. How, then, can this body consistently decline to exercise the jurisdiction which is plainly cast upon it by the statute as interpreted by the court of last resort and refuse to pass upon its claim for damages?

The opinion of the majority indicates that com-

plaint may be made to the Commission, which will thereupon determine whether the regulation attacked is or has been in violation of law. If the Commission condemns the regulation, the complainant must then begin an independent suit in court for the recovery of his damages, upon the basis of the regulation approved by the Commission. The theory seems to be that the Commission has jurisdiction to prescribe the rule, but has no jurisdiction to award the damages which have resulted from failure to establish and observe a proper regulation in the past.

I express no opinion as to whether, if this Commission has definitely determined that a given rate or a given regulation for a definite period has been discriminatory or excessive and has prescribed the rate or regulation which will be reasonable or just, a shipper may or may not begin suit in court for damages based upon the rate established by the Commission. Such a rule would not be obnoxious to the objections found by the Supreme Court to the maintenance of the suits of the Abilene Cotton Oil Company and the Pitcairn Coal Company. It may be that such instances would present an opportunity for the alternative mentioned in the ninth section. I also think that a case like that of Joynes, where the act of the carrier is directed to a particular individual and does not consist of the enforcing against the public of a general rate, regulation, or practice, presents an instance where the party aggrieved may either sue in court or present his claim to the Commission. But this complainant must have begun before the Commission and the Commission should have jurisdiction to award the damages.

Upon what theory does the conclusion of the majority to the contrary rest? What is there in the language of the act which supports it? What is there in the structure of the act which lends countenance to it? To my mind both the language and the theory of the statute are directly opposed to it.

Nothing can be plainer than that Congress intended to confer upon this body the authority and to lay upon it the duty to award damages for infractions of the act. This idea runs through the entire framework of the statute.

Section 9 provides that the person damaged may apply to the Commission or may bring suit in court, but shall not adopt both remedies for the same violation.

Section 13 provides that if the carrier "shall make reparation for the injury alleged to have been done, such carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of."

Section 14 provides that "in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 16 declares that if the Commission shall determine that any party complainant is entitled to an award of damages it "*shall* make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named." The same section fixes the period of time within which claims for damage shall be filed with the Commission and within which suits shall be begun in court to enforce the orders of the Commission awarding damages. That section also prescribes in detail the legal proceedings by which an award of damages may be enforced against the defendant.

Up to the time of the *Joynes case* it had been, as is pointed out by Commissioner Lane in his dissenting opinion in that case, 17 I. C. C. Rep., 361, the uniform practice of the Commission to award reparation in all cases where damages accrued from a violation of the act.

It is said that the Interstate Commerce Commission is an expert tribunal and that the assessment of damages is not within the range of its expertness; that it

is an administrative body, and that the determination of damages is judicial and not administrative; all of which amounts to saying that the Commission is not qualified to deal with this question.

To this I am not prepared to assent. I can not admit that this body is not as well qualified as a traverse jury to assess the damages of these complainants. For years we have investigated, in one form and another, in all its ramifications, the business of mining and selling coal. We understand, as no jury without that knowledge possibly could, the effect of this discrimination upon the business of the coal operator. In my judgment the decision of the Commission would be more intelligent and less likely to be influenced by prejudice than that of a jury. But all this is entirely beside the mark; Congress, in set terms, has made it the duty of this Commission to award damages, and it is no concern of ours whether that provision of law is wise or unwise.

It is said that the Commission has no time to deal with such matters, and it certainly is true that its duties are various and exacting. But this, again, goes to the expediency, and that is not for our consideration; we can not decline to attempt to discharge the duties prescribed by the statute because it is inconvenient to do so.

The opinion of the majority holds that the complainant must first obtain from the Commission a finding that the regulation in effect has been discriminatory and determining what regulation ought to have been maintained; armed with this finding he may then bring suit in court for the recovery of his damages. It seems to me that certain practical difficulties will be found in the application of such a rule, one of which is suggested by the present case.

The complaint asks damages from 1903 to the present time. The Hepburn Act provides that suits for the recovery of damages shall only be entertained by the

Commission when filed with it within two years from the time the cause of action accrues, but it further provides that within a year from the passage of that statute complaints may be filed embracing all damages which had previously accrued. This complaint was seasonably filed to recover damages for the period named.

The complainant has diligently prosecuted its complaint, and now obtains a holding from the Commission that the regulation attacked is unlawful. If our order be made effective on June 1, 1910, it would follow that the complainant is then for the first time in position to maintain a suit in court.

But the order of the Commission fixing this regulation as to the distribution of coal cars is not of necessity final. It may be attacked in the courts by the railroad, and still another period of from one to three years may elapse before it is finally determined what regulation should have been in force during the period when these damages accrued.

What, now, is the rule to be applied as to the running of the statute of limitations? The usual period of limitation applicable to suits for the recovery of damages of this character is from three to six years. If the six-year period were to be applied the complainant has lost his damages for at least one year. Having seasonably begun his proceeding in the only forum in which it could be begun, and having prosecuted that proceeding with all diligence, he is, nevertheless, deprived of the right to the damages for a portion of the period.

It may be suggested that the filing of the complaint before the Commission may be regarded as the beginning of the suit which is subsequently brought in court. But there is no connection whatever between the proceeding before the Commission and the suit in court. All allegation as to damages for discrimination is immaterial and out of place before the Commission. And what of the competitors of the complainant who have suffered the same discrimination? Must these parties

all file suits before the Commission to determine the regulation which ought to have been observed by the railway, although the determination in one case must of necessity control in all cases?

It may be said that a complainant should begin two proceedings, one before the Commission to determine the regulation or practice and another in court for the assessment of his damages, and that the suit in court should be continued until the Commission has prescribed the rule. But the statute explicitly declares that while the party injured may begin either before the court or the Commission he shall not begin in both places.

The seventh amendment to the Constitution of the United States provides that in suits at common law where the value in controversy exceeds $20 the right to trial by jury shall be preserved. The effect of this constitutional provision, if any, upon the question before us, is yet to be determined by the courts.

The original act to regulate commerce provided that an order for the payment of damages should be enforced by the court sitting as a court of equity. Under this state of the statute the Commission held that it could not award damages, where a determination of fact was necessary, for the reason that the parties would thereby be deprived of their right to a jury trial. For the purpose of removing this objection the act was amended March 2, 1889, so as to provide that where suit was brought to enforce the Commission's order for damages either party might demand a jury trial. That the Commission understood that under the law as amended it could and should award damages appears from the following language, which occurs in the last case in which an award of reparation was refused upon this ground. *Rawson v. Newport News & Mississippi Valley Co.*, 3 I. C. C. Rep., 266, 279:

> As to the reparation claimed, prior to the amendment of the sixteenth section of the act to

regulate commerce of March 2, 1889, we held in several cases, that as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at common law and where more than $20 was involved, we could award no reparation in consequence of the provisions of the seventh amendment to the Constitution of the United States. The amendment of the statute of March 2, 1889, was made to cover this feature of the statute, but the amendment expressly provides that it shall have no reference to proceedings pending at the time the amendment was adopted; and this proceeding was pending at that time.

In my own view a proceeding to recover damages for failure of a railroad company to publish and maintain a certain rate or regulation is not a suit at common law within the meaning of the seventh amendment. The legislature may prescribe either by itself or through a commission the rate or regulation to be observed. Neither the shipper nor the carrier has any right at common law to a particular rate, nor need the reasonableness of the rate prescribed by the legislature be submitted to a jury. The legislature might undoubtedly enact that the published rate or regulation should be binding upon all until changed. If now, it allows reparation with respect to the past it may do so upon condition that the amount shall be determined in a specified manner not involving a trial by jury.

The opinion of the majority makes no reference to the seventh amendment, nor do I see that the conclusion reached derives any support from that source, since that amendment must apply equally to the assessment of all kinds of damages. In awarding "rate" damages the Commission must determine the existence of certain facts, as the weight of the shipment, its character, the conditions of the billing, etc.; and these findings of fact may be conclusive upon the right of the

complainant to recover. If such findings must be submitted to a jury in one class of cases they must in the other.

The delays and expenses of the law are proverbial. Especially is this true where the defendant is a railroad company with unlimited resources. It is notorious that shippers forego claims which they believe to be just rather than incur the cost and annoyance of attempting to enforce them by law.

One cardinal purpose of the act to regulate commerce was to provide a speedy and inexpensive method by which the shipper could obtain relief in such cases. My own observation is that, to an extent, this expectation of the framers of the act has been realized. The complainant does ordinarily obtain his order for damages with less delay and outlay than in court, and the railroad generally pays the award.

The complainant claims to have been damaged by more than $100,000 through the discrimination which we have found to exist, and its evidence tends strongly to support that claim. A material part of these damages never can be recovered unless awarded in this proceeding, and that through no fault of the complainant, which seasonably began and has zealouly prosecuted its complaint. Days have been spent in the taking of testimony; all the facts are before us, and I strongly feel that we should proceed to assess and order the payment of these damages.

The opinion of McPherson, Judge, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed. Rep., 748, which has come to my attention since the foregoing matter was prepared, fully sustains the position taken.

There are two other points to which I wish to call attention.

This record indicates that at times the number of private cars delivered to certain mines has exceeded the quota of those mines. Even if private cars had been counted against the assignment of those mines,

they would still have received more cars in proportion to their rating than the complainant.

In such case it seems to me that the railroad is guilty of discrimination, although it delivers to the mine only the cars which that mine owns. If, for example, a railroad only had sufficient cars for its own fuel supply the mine owner who did not sell coal to the company and who owned no cars himself, would obtain no cars whatever, while his competitor with an outfit of individual cars would be supplied. I do not think a railroad can lawfully devote its tracks and its motive power to the service of one mine, while declining to give to its competitor a similar service.

Probably, in the absence of contract provision thereto, a railroad would have no right to divert the cars of one mine to the use of another, but it might and should decline to put private cars into service except upon condition that there shall be no discrimination of this kind.

This may not be a matter of much importance in the present case. The use of private cars is growing less, and the question will, in all probability, never be a living one. I do not, therefore, care to discuss it, but wish simply to note my position. In the matter of car distribution every car should, in my opinion, be treated as though owned by the railroad upon whose line it is in service.

The rule approved by the Commission for the rating of mines takes account both of physical capacity and commercial sales; and this, I think, is correct. When, however, the output has been limited by inability to obtain cars, and when that inability has been due to the discriminating practices of the defendant, it is evident that the application of this rule perpetuates at the outset the effect of the past discrimination. The complainant, owing to this discrimination, has not been able to sell as much coal, in comparison with its competitor, as it otherwise would, and therefore its rating upon this basis is not what it justly should be.

For this reason it seems to me that it would be more just to begin upon the basis of physical capacity alone and subsequently introduce the factor of commercial sale, considering no sales which had been made under the discriminating rating.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned

cars", from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

I, EDWARD A. MOSELEY, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission are true copies of the originals now on file in the office of this Commission.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Commission, this 18th day of August, 1910.

(Seal)

E. A. MOSELEY,
Secretary.

1.30 p. m.

Present: Parties as before noted.

CHARGE OF THE COURT.

Hon. Oliver B. Dickinson, *J.*

Gentlemen of the jury: The first impression, I think, which we are apt to receive in cases of this character is the one of their complexity and of their difficulty. There is in this case one very gratifying and refreshing feature. The case has been tried and defended not only with ability but with that spirit of candor and fairness which is always, with very few exceptions, the accompaniment of real ability. We have reason to be grateful for that, because counsel have met the questions involved in this case and presented them to you on the one side and on the other in such a way as to have removed all complexity from the case and reduced the questions upon which you will be called upon to pass to really very simple questions of fact. While they are thus simple in character, that unfortunately does not relieve you of the difficulties which surround their decision. But it is a great help and a long step toward your decision of them.

Now, the first thing you will want to know is what the question is which you are to decide, and what the case is which you are called upon to determine. Let us see if we can get that clearly in our minds.

This case arises out of acts of Congress which are known as the Interstate Commerce Law and the Elkins Act. The general purpose has been explained to you by counsel. They are really fair play laws. That is what they are. They are meant to enforce fair play to manufacturers, miners, and other producers; fair play to the business men who trade in the products of our manufactories and of our mines; fair play to the shippers who have occasion to use our railroads and

other transportation companies; fair play, at least incidentally and indirectly, to the people who are the ultimate consumers of these products; and fair play as well—and, indeed, this point may be emphasized—to these great transportation companies, which form such an important part of our industrial life.

Now, what is the general idea of them? Because it is well for you to get this thought in your minds in order that you may understand just your own relations to this case, why you are called upon to decide it, and the real spirit in which you will take hold of the performance of your duties. Now, the general idea is this: The necessity for the enforcement of the obligation of every one of these public utilities—for that is what they are—in the dealings of these transportation companies with those who have business with them, that the dealings shall be fair and their regulations, necessary to which to subject the business, shall be reasonable; the rates charged as compensation for the services rendered shall not be undue or unreasonable. You can realize at once the importanc of that, and therefore the importance of the duties which you as a jury have to perform. Take two men, for instance, who are in the same business upon the same line of railroad, the absolute necessity confronting each one, a necessity of the very existence of his business, that he shall be able to receive the raw material of his manufacture, and that he shall be able to ship his manufactured products to his customers. Suppose, for instance, that one of those men is not able to secure not merely that facility for the transaction of his business but that absolute necessity for the transaction of his business. You can see right at once that a system that involved unfair or partial distribution of cars, or other shipping facilities to him, would be a condition of things that would reek with injustice to the man against whom that discrimination was made. That part of it is simple enough. But while each one of these shippers is

entitled to his fair share, it is not as easy as it would seem to be on the surface to determine what his fair share is. You might say, in the first instance, that every man was entitled to his equal share, in the sense that he was entitled to the same amount of service. You could see in a glance that that would not do, because here is a man who might be in a business in which it requires him not to use more than a car or two a week, and another man or another concern in the business might be in a position in which it would be necessary for him or them to use ten or twenty or one hundred, or any number of cars a week. To distribute the cars, therefore, upon the basis of an equal distribution in numbers would be a business absurdity, and really as great an injustice as any other form of distribution which could be made.

Now, therefore, you have had in this case that element to which reference has been made or what has been spoken of as the capacity of these different mines, or their rating, and when we get that element into the case then you see that the distribution ought to follow that rating, and a man get his due share in that sense. So you can see the question becomes at once a complicated one.

Now, there are other elements that may enter into it. Here is a railroad company, for instance, which is in need of fuel. It cannot run its cars without it. It must procure its fuel from some producer, some mine, and of course it has the right to purchase, as everyone else has—and must have the right to purchase—its coal from any producer whom it may select, and it must have that right free and untrammeled. Now, therefore, the coal that is shipped in cars which are used for the purposes of the railroad alone, not for general commercial purposes, enter into it.

Now, there is another element that enters into it, and that is this: One man may have cars of his own in a considerable number. One man may be so situated that

he does not have any cars of his own. Cars that have been described here as private or individual cars. Now, the question of what is the fair share of each mine, you see, becomes a question of undoubted complexity, and you can see at once the real difficulty in determining just what the fair and reasonable share and proportion of each one is.

If at all times there were cars enough to supply every one up to the full capacity of his manufactory, or of his mine, then of course the problem would become very much simplified, but we all know that that is a practical impossibility, and there are times when we have what are called car famines. There are not enough cars to answer to all requirements. If one man gets an undue share, the other must be put off with less than the number that belongs to him. So that you see the question becomes a very difficult one. Now, in order that this business may be done, the railroad companies, the transportation companies, are of necessity bound to make some regulations, to have a system upon which this business may be transacted. They use the very best judgment that they can use. In a situation presenting the practical difficulties which you can easily see a condition of this kind does present, the transportation companies, acting in the best faith imaginable, using the very best judgment of the most highly trained men whose services they can secure, may nevertheless adopt or put in force a system which is found not in practical results to work out equal justice to all. The responsibility must be put upon them. It seems like a hardship, and in a certain sense it is one, but it is one of those necessary accompaniments of the difficulties which confront us in all phases of life. It is necessary to put upon them the responsibility of seeing that they make the proper kind of distribution, and if they do not and a shipper or other is damaged by reason of his not securing his fair share or his proper proportion, then as he is damaged—and as he is not responsible for

that loss or damage—it necessarily must be put upon and borne by the transportation company, and it must respond to his claim for damages.

You see, therefore, that when you come to the decision of this case it obviously calls upon your sense of fairness and justice, for if a man has been damaged he should be permitted to recoup himself for the real loss that he has sustained. But he is not entitled to more than what his real damages are, as the railroad company is compelled to respond only to that claim. It would be obviously unjust that that claim should be increased to anything beyond what is fair and just.

Therefore, you see the first question is the necessity to have some tribunal which will decide whether a given rule or regulation or system or mode of distribution by these transportation companies is reasonable and is fair, or is unjust and what has been called discriminatory. In other words, is it a proper rule or an improper rule? Some tribunal must decide that question, because we cannot get anywhere until it is decided. That is perfectly clear.

Now, the law might confide the decision of that kind of a question to you gentlemen of the jury, but you see the trouble there would be in submitting it to a jury. You are trying a case here today about a regulation. It might seem to you that that regulation was fair or that it was discriminatory and unjust. Another jury in New York, or perhaps in California, or in any other district in the whole United States, might have the same question before them. It might look to them in a different way from what it looked to you. Then what would be the result? Why, you would have one kind of a law in one case and another kind of a law in another, and you see that would not do. It would not do to have one man recover on really the same state of facts and another shipper be unable to recover. The railroads nor the shippers nor anyone else would be able to tell what the proper rule, what the proper reg-

ulation, what the proper system, was. It is necessary to have that uniformly applied alike in all cases and to all shippers and all railroads, the same rule, and therefore the necessity for having it decided by one tribunal, and the people, for the purpose of accomplishing the purposes of this law, have established that tribunal, and it is the one to which you have heard frequent reference made here as the Interstate Commerce Commission.

Questions of that kind are called administrative questions. The Interstate Commerce Commission, and the Interstate Commerce Commission alone, can decide that class of questions, and when it decides them they become as much the law of the land as if they were written into an act of Congress, and everyone of us is bound by it.

Now, you have another thing which it is necessary to decide. You may have your rule—that is the law of the case; you may have the proportion of cars to which an individual shipper is entitled under the law of the case, as established by the Interstate Commerce Commission; and you may know all of that, but here is John Smith who comes with a claim and nobody knows whether he actually did get the cars to which he is entitled or not. The Interstate Commerce Commission, or the law of the case—in his case before us—would tell us to how many he is entitled, or give us the rule by which we can find out, but this law could not tell us whether he had in fact obtained those cars or not. Now, how are you going to decide that question? Somebody must decide that question also. The law has provided for that, and anyone who claims that he has been discriminated against, if he wants to test the question of whether the rule of distribution is discriminatory, unreasonable, unjust, or fair and reasonable and proper —if that is what he wants to do—he must go before the Interstate Commerce Commission, because they are the only people who can decide it. But if after the

rule has been determined, and the number of cars to which he is entitled, or the rule by which that can be determined, has been found, and he comes in complaining about a shortage, and the only real question is whether or not there was a shortage in his particular case, that you see is a simple, plain question of fact, and it can be determined in one of two ways. The man can bring his action in court, just the same as you would sue a man for damages if he had made a contract with you and broken his contract, just the same as you would bring your action against a trolley company or a railroad company where through its alleged negligence your person had been injured or property had been damaged. You bring the suit in precisely the same way. You would submit your case to the jury in the same way, and you would have it decided in the same way. He can do that in the first instance, or he is given the privilege at his election of submitting all of those questions to the Interstate Commerce Commission. So that they pass upon the question of discrimination, and they pass also upon the question of damages.

Now, that has been done in this case, and the Interstate Commerce Commission has passed upon all of those questions. Therefore, the inquiry would at once arise in your minds, or anybody else's, "Well, if it has already been decided what are we to do?" Just let me explain what you have to do. The people of the United States have time and again declared that when a question of fact comes to be decided their preference is and their insistence is that it shall be decided by a jury of the land. The people might submit it to lawyers, a tribunal of lawyers, or of judges, or of this Interstate Commerce Commission, or appoint an arbitration board, or they might do it in any way in which they decide to do it, but the people of the United States have said, "No; every question of fact of that kind our will is shall be decided by a jury." Now, that brings the question to you.

The situation, then, is simply this: The Interstate Commerce Commission has inquired as best they could, from all the light they had, into this question, and they have decided what the proper rule of distribution is. By that we are bound. We must take their ruling on that. It cannot be questioned, and it is not questioned, in this case. Another thing is that they have decided the amount of the damages in this case. What is the effect of that? The effect of that is this: A man or a corporation against whom it is found has the right, if he chooses, to pay it, if he thinks the amount is correct, and if he pays it that is the end of it. There can be no further claims made upon him. But the law does not require him to pay it, and if he thinks that there has been a mistake made, or if he thinks that the amount is unjust, or if he thinks he has any good reason for refusing to pay it, the law gives him the right to refuse and justifies him in refusing, and he need not pay it, and that tribunal is without power to enforce its payment merely because it decided that it was due. Then what? Then the party in whose favor the award is made may bring his action and submit his claim to a jury, just such a jury as you are, and that jury passes upon the question of what the amount should be.

Now, the findings of the Interstate Commerce Commission are made evidence. That means that you are to be informed what its findings were. All the evidence that was before it has by the stipulation of counsel in this case—and on both sides they are to be commended for having met this question fairly and for having shortened your labors as much as possible—they have permitted everything that was before this Commission to be known to you. So that you have the decision of that tribunal—you have the testimony which it had before it, before you, precisely the same as if the witnesses had come here and testified to the facts.

In addition to that, other witnesses have been called, and you have heard their testimony, and it is

brought home to you now to decide this question. The law makes it evidence. It is not conclusive evidence. It does not bind you or your judgments. The Interstate Commerce Commission, of course, we all appreciate, deserves the high tribute which has been paid to it by counsel, paid to it as a tribunal by counsel, paid to the personnel of that tribunal, and the law makes its findings evidence, and of course it is entitled to our most respectful consideration. It is entitled to all the weight which you would give to any other credible evidence that came before you from the most highly respectable source from which evidence could come. You are to consider it just as you would consider the sworn testimony and evidence in this case coming from credible witnesses and from a highly respectable source. You are to consider all this as evidence in the case. But, gentlemen, you are to decide this case according to your own conscientious judgments. So far as this evidence affects your judgments, so far as the arguments addresed to you by counsel move your minds to one decision or the other, that honest conscientious leaning to one side or the other, you are to follow it, but your verdict is to be your verdict and reflect your judgment upon the facts in this case.

Now, I have said they were very simple. Let me see if I can make clear to you just what the question is and the fact that you have to decide.

There are two cases here before you. You are to decide each case as if that was the only case that was before you. I have already explained to you why you have the two cases, and the reason for having two instead of one. I will repeat it in case it may have escaped your attention or faded from your memories since it was stated. There was a firm engaged in the mining business known as the Bulah Coal Company, I think, or some such name. The absolutely correct name is unimportant for the purpose of expressing the idea. That was a firm, a partnership. It was made up of cer-

tain individuals. They had shipping transactions with the Pennsylvania Railroad, the defendant in this case, which extended over a number of years. I think the time was from some time in 1902 until some time in 1904. One of the members of that firm died. As you all know, the effect of a death of a member of a firm is in a sense to end that firm. The firm was what is known as dissolved by death, and the surviving partner proceeds to wind up, as it is called, the affairs of that firm. That firm being in that situation, another firm was formed and someone else was brought in as a partner. They adopted, as they had the right to do, the same name. They succeeded, as they had the right to succeed, to the same business, and I have no doubt, for all practical purposes, they went on the same as before. But you will see in strictness the first firm was made up of two people, and the second firm was made up of two people. One man was a member of each firm, but the other member was a different member. So the interests were divided, and that is why we have the one-period and the two-period, to which reference has so frequently been made.

Now, we will take the first period. Let me say to you that counsel for the plaintiff, for the purpose of simplifying this case before you, are asking for no damages except those which are embraced in two elements, and they having restricted their claim to those two things of course we need not bother ourselves with any other possible damages which at least theoretically they might have suffered. We will confine our attention to the two to which they ask us to direct our attention.

Now, what are they? One is this, that during this first period, from 1902 to 1904, they did not receive their due allotment of cars. As I understand the situation, there is no dispute about that fact, and you need not trouble yourself about it. They say that that resulted in damage to them, and there is no dispute about that proposition, for it is admitted that it did result in dam-

age. So that simplifies it, and we are down to the simple question of how much. Now, how much would depend, of course, upon the extent of the shortage, and here again you are relieved of all trouble of inquiry—and you will see how the question becomes a more and more simple one—because the parties on both sides, in that same spirit of fairness and in that same effort to relieve you of unnecessary labor, raise no dispute about the amount. That is claimed to be 9,523.68 tons, and the defendant says, "Well, we will not raise any question about the amount. It may be exactly right, or it may not be, but we will relieve the jury of that." So you may consider that if they had received the number of cars to which they were entitled they would have been able to ship during that period 9,523.68 tons more than they did ship.

Now, here comes in another question. We are in the United States Court. We are administering the laws of the United States. There are certain things which pertain to the jurisdiction of the United States and certain things which pertain to the jurisdiction of the different states in which we may live. We, for instance, have our State transactions, occurring within the State of Pennsylvania. We have what are called our inter-state or national transactions, which take place across State lines. Now, we are concerned here only with those transactions which have crossed State lines, and here again you are relieved of any trouble of inquiry for the parties are in accord upon the proposition that the shortage in inter-state transactions was 3,878.4 tons, or close to 3,900 tons. You have that fact, and you need not trouble yourselves with another. These people, if they had received the cars to which they were entitled, would have shipped in inter-state transactions 3,878.4 tons of coal more than they did. Now, they did not ship it, and the railroad company must pay the loss or damage which resulted to them by reason of it.

Now, what is the damage? In the first place, they say, "If we had mined, sold and shipped that coal we would have received a profit upon it." Therefore, the question is how much would have been their profit, because clearly the loss of that profit is a damage. The first thing you want to know in your figuring on profits is what is the gross profit which they could get for their product; secondly, how much does it cost to produce it. Now, what they get is not their price, that is clear; their profit is the difference between what they get and what the thing costs to produce. Now, here again you are relieved of the trouble, and the problem is further simplified for you, because the parties raise no question as to the selling price. It was $1.598. The parties do not question the correctness of those figures; so you do not have to inquire into that.

Now, the next question is what did it cost to produce. There is the controversy between these parties. That is the fact, the simple fact, which you are to decide. During that period, 1902 to 1904, what was the fair cost for producing this coal? The plaintiff says it was 88 cents, and they point to the evidence—and I do not care to take the time to go over it, because it is unnecessary; it has been fully and ably discussed by counsel, and that argument was addressed to you by the plaintiff for the purpose of convincing you that the fair cost of the production of that coal during that period was 88 cents a ton. If it was, then the difference between $1.598 and 88, or 71.8 cents is the profit, and if that is the right figure, then of course every man's common sense would tell him to just multiply that by 3,878.4 tons, and you have that element of damage resulting in $2,784.41.

Now, of course, gentlemen, in every case you are not done with it when you hear one side. You get that one clearly in your minds. That is perfectly simple and perfectly clear, and that the question for you to consider is "What was the fair cost of producing

this coal?" I have given you what the plaintiff says about it. Now, the defendant says that that is too low; that it could not have been produced for that; that they could not have received as large a profit as 71.8 cents on every one of these tons. That it would have been less than that; and they say—and that was the purpose of calling Mr. Hatfield as a witness before you—he says that the fair cost instead of being 88 cents was $1.19, and while it is admitted that there was a profit, and admitted that there was a damage, the profit and consequent damage was not 71.8 cents but it was 40.8 cents a ton. Now, if the profit was only 40.8 cents a ton, and the plaintiff is entitled to only the profit in this feature of the case, then of course the damage would not be 3,878.4 tons multiplied by 71.8 cents, but it would be 3,878.4 tons multiplied by 40.8 cents, and the amount would be $1,582.22 as against $2,784.41. I think, gentlemen, that that is clear.

Now, you see this whole case, complicated as it seemed when we started, so far as this element is concerned, is brought down to that simple question of fact for you to decide, what was the fair cost of producing that coal. Could it have been produced for as low as 88 cents, as the plaintiff says, or would it have cost $1.19, as the defendant says, or what in your judgment would it have cost? That gives you that item.

Mr. Roads: May it please your Honor, may I interrupt your Honor? Didn't you make a mistake there? It is four cents, the difference between $1.19 and $1.23.

The Court: You have your mind, Mr. Roads, on the cost, not on the profit. You are speaking about the cost. That is the element to which I come now. After you hear this if you do not agree with me, let me know.

Now, there is another element of damage. The loss of profit is not the whole damage. That is this, that if a man equips his manufactory, or his mine, or anything else, for the purpose of putting out a certain output, and somebody interferes with him and cuts down his

output, and his cost expenses run on just the same as if he were getting out his full product, the cost per unit in tons, or whatever else it is, would of course have increased. That is so obvious that it is not necessary for me to more than state it.

Now, the plaintiffs say, "We were damaged beyond the loss of profits by the fact that the coal we did get out, the reduced amount, cost us more than it should have cost us." Here again the parties have relieved you of the labor of figuring on it by agreeing, or at least having no dispute over the proposition, that it did cost them $1.23 for the quantity of coal that they put out. Now, if they had been given their full quota of cars, what would it have cost them—not in the aggregate, understand, but per unit ton—what would it have cost them to have put out the increased amount. The plaintiff points to the finding of the Commission as part of its proofs, and all the other proofs that they have adduced before you, and to which counsel has called your attention, and they say that the cost would have been 88 cents, just what the cost in the other case was. What is the result? They were compelled to submit to a unit cost of $1.23. If they had received what belonged to them, their unit cost would not have been more than eighty-eight cents. In consequence they have been damaged by that excess, or 35 cents a ton. Therefore, all you have to do is to determine how many tons were shipped, and here again you limit it to interstate commerce. How many tons were shipped in interstate commerce? The parties agree upon those figures. If plaintiffs were put to an additional cost of 35 cents a ton, and they shipped so many tons, then their damage in this respect would be 35 multiplied by the number of tons, which they foot up to $15,807.07, and they add those two elements together, and that is what makes their total claim of $18,591.48.

Now, here again there being controversy we will see what the other side has to say. What do they say?

They say again—and here the testimony of Mr. Hatfield is introduced, and the other evidence that they have offered, all going to persuade you that the real cost would have been not 88 cents but $1.19. So that the defendant says, "Your cost damage as you figure it is entirely too high. It cost you $1.23. Very well, we will accept your statement on that. But it would have cost you not 88 cents, but $1.19." Now, the difference between $1.23 and $1.19 is not 35 cents, but it is 4 cents, and you simply multiply the same number of tons shipped in interstate commerce by 4 cents instead of 35 cents, and you get their estimate of this damage as $1,806.52, as contrasted with $15,807.07.

I assume that is right, Mr. Roads. I have not heard you say it was wrong.

Mr. Roads: That is right, if your Honor please. I thought you were treating with that branch of the damage.

The Court: Then, we are agreed as far as the figures go, that that is right.

Now, there, gentlemen, you have your contrast on the first claim. The plaintiff foots up a total claim of $18,591.48, made up of these two items, and the defendant, taking the same elements, foots up a total of $3,388.74. Those are the two simple questions of fact that you are to decide under the evidence in this case, and it all, you see, resolves itself into the one question of what was the fair cost of producing this coal, and the rest is a mere matter of simple calculation after you have once determined that.

Now, we come to the second period, and we have substantially the same sort of a division there. First, the division into profits, the element of lost profits, as part of the damage, and the element of increased cost as another part of the damage, and you take it in that same way, although the figures vary for that period. The parties again have relieved you of the labor of finding out what the price was by agreeing that you

may take it at $1.132. Now, the question is what did it cost to put it out, and here again you have a difference of opinion. The plaintiffs says that the cost in the second period was the same as the cost in the first period, or 88 cents, and consequently the lost profits is the difference between the $1.13 and the 88 cents, or 25.2 cents a ton. Now, you multiply that by the number of tons of coal which would have been shipped in interstate commerce—did the parties agree upon the number—plaintiffs make that item as an item of $12,232.17 in the second case. That is the item of lost profits. Now, in the same way they take the increased cost to which they say they were subjected, and here again there is an agreement that the actual cost was $1.08 for that period. They say the proper cost should have been the same as it was in the first period, or 88 cents, and consequently they have been put to damage because of the increased cost of 20 cents a ton. For the purpose of this calculation you may take the figures 97,417—and there is no dispute as to that—which makes a total damage in this respect of $19,683.40. That makes the total claim of the plaintiff for the second period $31,715.57.

Now, you have precisely the same kind of a difference between the parties here again. They take the same price, $1.132. The question is upon the proper cost during the second period. The plaintiff, as I have said to you, says the proper cost was 88 cents. The defendant says they could not have produced it under a dollar, and they have brought all their evidence before you for the purpose of convincing you of that. If the cost was $1.00, then the lost profit was the difference between $1.132 and $1.00, or 13.2 cents, and that multiplied by the total would give you the damage, which on the basis of the same tonnage which the plaintiff adopts would be $6,407.28.

Now, in the same way they take the increased cost. They start with the same figure, that the actual cost is

$1.08. The plaintiff says that the proper cost, if they had been supplied with the cars that they should have had, they could have put it out for 88 cents instead of $1.08. The defendant says, "No, you could not; it would have cost you $1.00", the same as in the other case. So that their loss there, instead of being 20 cents a ton on that item of increased cost, would be eight cents a ton, and therefore the damage on that item could not have exceeded $7,793.36, as contrasted with $19,483.40, or a total of $14,200.64 as contrasted with a total claim on behalf of the plaintiff of $31,715.57.

Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally ex-

pect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, "How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty, then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?" Your conclusions would be that there was something wrong in the calculation of unit costs. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get the amount at a unit cost of a certain amount

per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105.

So you see the whole case turns upon really these two questions of fact, which you as a jury are to determine. The one in the first period—and that is really the only question there—the real and proper cost to which the plaintiff would have been subjected in getting out this additional tonnage to which it is agreed they were entitled; and in the second place to the questions of fact as to the same cost again, and bearing upon that, and important in itself, the quantity of the tonnage. So that this case, which at the outset started to be so complicated and so difficult, you will see resolves itself into these simple questions of fact.

Now, if you find for the plaintiff you will include in your verdict such an amount as will compensate him for this difference. It has been some time since the damage was done. Had he received his money then when the damage was freshly done, all he would have been entitled to would have been his damage, but some time has elapsed, necessarily elapsed—and you are not to attach any blame to anybody for that; the problem submitted to the Interstate Commerce Commission was a very complex and difficult problem, and it took a long investigation to determine just what the facts really were; it was nobody's fault that they were not paid at once, because nobody could know then what the damages were, but that is not the fault of any one, and it is not the fault of the plaintiff, and therefore you are to put him back by your award now in the same posi-

tion as if you had given him the amount of damages at the time at which he was entitled to them.

Now, how are you going to level that up? Why, that is very simple. You take the amount, and you allow him such an additional sum in the way of damage as would make up for that difference in time. It could not exceed legal interest. It may be whatever in your judgment will make up the difference between the amount which he receives to-day as contrasted with having received it at the time the injury was done. Is there any dispute about the date?

MR. BIKLE: No dispute about the date.

THE COURT: The date, then, is June 28th, 1907, and you will take that date. In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest.

I think I have gone over the subject matter of all the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered.

MR. ROADS: If your Honor please, on behalf of the plaintiff we would request you to charge the jury that the findings of the Interstate Commerce Commission are prima facie evidence, and the effect of that rule.

THE COURT: Gentlemen of the jury: I have already adverted to that in my charge. I will repeat it. The law makes the findings of this tribunal evidence. It is what we call prima facie evidence. That is, there is no reason appearing why you should not credit it and why you should not believe it in the first instance. Therefore, until it is answered it is what we call prima

facie evidence. In other words, on the face of it you would credit it if you did not hear anything to the contrary. But the law does not make it conclusive. It is not binding upon you. You take it as evidence. If it convinces you of its truth, considered with all the other evidence in the case, then you follow it precisely as you follow the testimony of a witness if it convinces you. But you take into consideration what is said upon the other side, and you consider all the evidence, and make up your own minds upon these questions of fact that I have submitted to you.

MR. BIKLE: In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the Court so charge.

THE COURT: Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period the claim is questioned in two respects, the cost, just as it is in the first period, and the tonnage is also questioned. So of course you cannot determine the amount of damage until you have settled both of those questions.

I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations? Is that correct?

MR. GLEASON: Yes, sir.

MR. BIKLE: Yes, sir.

THE COURT: So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present these respective views. You will take the case and dispose of it.

Counsel for the plaintiff except to the answer of the learned trial judge to the request to charge concerning the fact that the findings of the Interstate Commerce Commission are prima facie evidence, and the effect of that rule.

(Exception noted for plaintiff, by direction of the Court.)

Counsel for the defendant except to the refusal of the learned trial judge to charge as requested by them in such points as were not affirmed.

(Exception noted for defendant by direction of the Court.)

Counsel for the defendant except to the following portion of the charge of the learned trial Judge:

> "Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.
>
> "Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of prod-

uct he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things, his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for each one is double that. If he put out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his ag-

gregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

(Exception noted for defendant by direction of the Court.)

Counsel for defendant except to the following portion of the charge of the learned trial Judge:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest."

(Exception noted for defendant by direction of the Court.)

Counsel for defendant except to the charge of the learned trial Judge in that it was inadequate in failing to call to the attention of the jury the evidence introduced by the defendant tending to establish the number of cars to which the plaintiffs were entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

(Exception noted for defendant by direction of the Court.)

Counsel for defendant except to the charge of the learned trial Judge in that it was inadequate in failing to call to the attention of the jury the method which must be pursued in determining the number of cars to which the plaintiffs were entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

(Exception noted for defendant by direction of the Court.)

The points submitted are as follows:

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422. December Term, 1912.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as the BULAH COAL COMPANY,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

DEFENDANT'S POINTS.

1. The present action is brought by the surviving and liquidating partner of a partnership to recover the amount of an award by the Interstate Commerce Commission in a proceeding instituted before that

body after the dissolution of the partnership by the plaintiff as such surviving and liquidating partner to recover damages claimed to have been sustained by the partnership, due to alleged unjust discrimination prohibited by the Interstate Commerce Act, to which it had been subjected by the defendant. The cause of action asserted before the Commission did not survive the dissolution of the partnership, and consequently was not legally maintainable after such dissolution, and the plaintiff cannot consequently recover in the present action.

2. In the proceeding brought before the Interstate Commerce Commission, the plaintiff in the present action was not entitled, as surviving or liquidating partner of the partnership formerly existing between himself and William J. Matz, to recover damages on account of any injury which may have been sustained by William J. Matz, as such partner because of the alleged unlawful discrimination complained of in that proceeding, and the award, therefore, made by the Interstate Commerce Commission in favor of the plaintiff, as surviving and liquidating partner of the said partnership, was invalid, in so far as it directed payment to be made to the plaintiff of damages on account of injuries sustained by the said William J. Matz as such partner.

3. It appears that the partnership existing between James H. Minds and William J. Matz, trading as the Bulah Coal Company, was dissolved by the death on April 12th, 1904, of William J. Matz, and that subsequently, to wit, on October 5th, 1904, an agreement of partnership was entered into between the said James H. Minds and Julia A. Matz, which by its terms was to date from April 12th, 1904. Any cause of action, therefore, that James H. Minds could assert as surviving or liquidating partner of the partnership

composed of himself and William J. Matz, to recover damages claimed in the proceeding before the Interstate Commerce Commission, was necessarily confined to the period antedating April 12th, 1904.

4. It appears that the award of the Interstate Commerce Commission which forms the basis of the present action covered a period extending beyond April 12th, 1904, and down to October 1st, 1904. The award, therefore, covers a period of time in which damages were not recoverable by the complainant in the proceeding before the Commission, and the award, therefore, was invalid, and the amount thereof is not recoverable in the present action.

5. There is no evidence which would justify the jury in determining how much of the award made by the Interstate Commerce Commission is properly referable to the period prior to April 12th, 1904, and in the absence of evidence on this point the jury cannot guess at the amount which is referable, and cannot, therefore, in the present action render a verdict for the plaintiffs for more than nominal damages.

6. The findings of fact of the Interstate Commerce Commission which have been put in evidence are not binding or conclusive. If the testimony in the case has shown that they are incorrect or erroneous, they should not be considered by the jury.

7. The burden is upon the plaintiffs to establish all facts necessary to a recovery, and one of these facts is the loss, if any, sustained by them as the result of the failure of the defendant to deliver the additional cars which the Commission has found should have been delivered to them.

8. The Commission found that in the period of the action the plaintiffs received cars sufficient to enable

them to ship 110,892 tons of coal, and that they should have received cars which would have enabled them to ship 9523.68 additional tons. There is no evidence in the case to contradict the correctness of these findings, and they are consequently to be accepted by the jury as correct and controlling.

9. The Commission found that it cost the plaintiffs on an average $1.23 per ton to mine and ship the coal produced and shipped by them in the period of the action, and that if the additional 9523.68 tons had been mined and shipped this average cost would have been reduced to 88 cents per ton. The correctness of this finding is disputed, and it is for the jury consequently to determine whether the finding is correct or incorrect.

10. The aggregate cost of the 110,892 tons actually mined and shipped, under the Commission's finding of an average cost of $1.23 per ton, was $136,397.16. The aggregate cost of mining and shipping 120,415.68, the total tonnage that should have been shipped under the Commission's finding, based on average cost of 88 cents per ton would be $105,965.68. The Commission's finding or conclusion is, therefore, manifestly erroneous unless under the evidence in the case the jury would be justified in finding that not only would the additional 9523.68 tons have been mined at no additional cost to the plaintiffs, but that as a result of the mining of this additional coal the cost actually incurred in mining the 110,892 tons would have been reduced. Under the evidence in the case the jury would not be warranted in assuming that such would have been the result of the mining of the 9523.68 additional tons, and consequently the jury would not be justified in accepting as correct the Commission's estimate of 88 cents as the mining cost had the larger output been mined.

11. The evidence has shown that if the plaintiffs had mined the 9523.68 additional tons they would have

been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiffs' damages.

12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of cars for the shipment of the 9523.68 additional tons.

13. If the jury find that $1.19 would have been the average cost of producing the coal if 9523.68 additional tons had been mined, then the plaintiffs' damages, due to the enhanced cost of mining the 110,892 tons actually mined due to the curtailment of the output, are to be measured by the difference between the cost as found by the Commission, viz., $1.23 per ton, and the cost which the plaintiffs would have incurred, viz., $1.19, or 4 cents per ton.

14. The plaintiffs in this action can recover only

profits lost on so much of the 9523.68 tons as would have been shipped to points outside the State of Pennsylvania. The Commission has found that the shipments to points outside the State would have been 3878 tons. In ascertaining, therefore, the damages for which recovery can be had in the present action, they must be confined to the profits on 3878 tons, which, at 40.8 cents per ton, amount to $1582.22.

15. The damages recoverable in the present action because of the increased cost of mining the coal actually mined must also be confined to that coal which was shipped to points outside the State of Pennsylvania. This amounted to 45,163 tons, and if the jury should find that the average cost of producing the larger output which the Commission found the plaintiffs should have received cars for was $1.19, the damages recoverable on account of this increased cost would amount to $2258.15, being 4 cents a ton on 45,163 tons.

16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.

17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.

18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2424. December Term, 1912.

JAMES H. MINDS and JULIA A. MATZ, trading as BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

DEFENDANT'S POINTS.

1. The burden is upon the plaintiffs to establish that in the period of the action they did not receive the cars to which they were justly entitled and the amount of the injury thereby sustained.

2. The findings of fact of the Interstate Commerce Commission which have been put in evidence are not binding or conclusive. If the testimony in the case has shown that they were incorrect or erroneous, they should not be accepted by the jury.

3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive, and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case.

4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule.

5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.

6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allotable to them to percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action.

7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's quota on each day on which they were available for shipments. This rule was a lawful and proper one and the Commission was not justified in ignoring or disregarding it.

8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which under the Commission's rule of distribution plaintiffs were entitled to receive in addition to those which were actually delivered to them.

9. The burden is upon the plaintiffs to establish all facts necessary to a recovery, and one of these facts is the loss, if any, sustained by them as the result of the failure of the defendant to deliver the additional cars which the Commission has found should have been delivered to them.

10. The Commission found that it cost the plaintiffs, on an average, $1.08 per ton to mine and ship the

coal produced and shipped by them in the period of the action, and that if an additional 71,257 tons had been mined and shipped, this average cost would have been reduced to 88 cents per ton. The correctness of this finding is disputed, and it is for the jury consequently to determine whether the finding is correct or incorrect.

11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined, including these 71,257 additional tons, would have been $1.00.

12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage, would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026.

13. The Commission found, and this finding is not

contradicted and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.132 per ton for any additional tonnage mined and shipped by them. The difference between this sum and the average cost of producing the coal to which the plaintiffs would have been subjected, represented the profit per ton which the plaintiffs would have realized on any additional coal which they would have mined and shipped.

14. The plaintiffs in this action can recover only profits not realized on so much of the additional tonnage which they should have received cars for, as would have been shipped to points outside the State of Pennsylvania. The Commission has found that 48,540 tons of the 71,257 tons for which it found cars should have been delivered to the plaintiffs, would have been shipped to points outside the State. If the jury, therefore, find that the plaintiffs should have received cars for the shipment of 71,257 additional tons, the recovery in the present action must be limited to the profits on 48,340. If the jury should find that cars for a less amount than 71,257 tons should have been received, then they would be justified in finding that the same proportion of this additional tonnage would have been shipped by the plaintiffs to points outside the State of Pennsylvania, as the Commission has found the plaintiffs would have shipped of the 71,257 tons already referred to.

15. The damages recoverable in the present case because of the increased cost of mining the coal actually mined must also be confined to that coal which was shipped to points outside the State of Pennsylvania. This amounted to 97,417 tons.

16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.

17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.

18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant.

The jury retired.

Counsel for the plaintiff and defendant agree that the clerk of the Court may take the verdict of the jury should they reach a verdict in the absence of the Court.

It is stipulated by and between counsel for the plaintiff and defendant that the testimony and charge of the Court in this case when transcribed shall be filed with the record of this case as the official transcript.

The jury having retired, counsel for the plaintiff moved the Court for compensation or attorney's fees, as allowed under the act.

Court adjourned.

Philadelphia, Thursday, October 11, 1916, 10 A. M.

Present: Parties as before noted.

The jury rendered a verdict in favor of the plaintiff as to the case of James H. Minds, etc., versus Penn-

sylvania Railroad Company, No. 2422, December Term, 1912, for $16,092.92, and as to the case of James H. Minds, et al., etc., versus Pennsylvania Railroad, No. 2424, December Term, 1912, for $33,618.37.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 8th day of November, 1916.

O. B. Dickinson, *J.* (Seal)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Session, 1912. No. 2422.

Action under I. C. C. Statutes.

JAMES H. MINDS, et al.,
vs.
PENNSYLVANIA RAILROAD COMPANY.

December Session, 1912. No. 2424.

Action under I. C. C. Statutes.

BULAH COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

OPINION.
Filed Nov. 6, 1916.

SUR RULE IN ARREST OF JUDGMENT AND FOR A NEW TRIAL.

DICKINSON, *J.*

These cases were, by agreement, submitted to the one jury and tried together. They arise out of the Interstate Commerce laws and the Elkins Act. The controlling principles of law involved may be thus formulated. After an order has been made by the Interstate Commerce Commission in favor of a complainant shipper against a railroad carrier for the payment of a damage award, proceedings brought in court because of the refusal of the carrier to comply with the order are properly for the damages sustained by the com-

plainant (limited to the amount set forth in the pleadings) and such proceedings are *de novo* and the damages are to be found by the jury under all the evidence, including the findings of the Commission which are made evidence by the Acts of Congress. The right of action given by the Interstate Commerce laws to a partnership to recover damages suffered by it through the discriminatory acts and unfair practices of a railroad carrier is not lost in whole or part by the death of one of the partners. The common-law rule that personal actions die with the person has no application. The jury, in assessing damages, may consider as an element the lapse of time between the incurring of the damage and the rendering of the verdict and allow for this in the assessment. Such element of damage, however, could not exceed the equivalent in amount of lawful interest. These principles are in consonance with and can be deduced from the rulings in a number of cases of which it is sufficient to refer to:

Texas Rwy. Co. v. Abilene Co., 204 U. S., p. 442,
I. C. C. v. Alabama Rwy. Co., 168 U. S., 174.
Western N. Y. v. Penn Co., 137 Fed., 343,
P. R. R. v. Clark, 238 U. S., 456.

We can get a sufficiently clear view of the instant cases to which these broad principles are to be applied through an outline statement of the main facts followed by a more particular statement of the special points now made.

The plaintiffs are mine owners or operators. The defendant is a railroad carrier within the meaning of the law regulating interstate commerce. The plaintiffs deemed themselves the victims of discriminatory rules and practices of the defendant in its car distribution. A complaint was made to the Commission. This coupled a request for administrative rulings with a demand for an award of damages. The Commission condemned the

regulations of the defendant and formulated the just rule of car distribution, convicted the defendant of discrimination and found the plaintiffs to have been damaged, and the amount of the damage. An order was accordingly made in favor of the plaintiffs. This order was not complied with by the defendant and it was followed by the bringing of these actions. The basic question, the answer to which supplies answers to most of the questions now involved in the cases, is presented in these queries: What is the plaintiffs' right of action? Is it an action for damages or is it limited to an enforcement of the order of the Commission so far as in favor of the plaintiffs? Important obvious consequences flow from the answer to this question. The answer must be sought in the Acts of Congress. The genesis of these laws will afford us some light. The evils which it was the purpose of the law to suppress are too glaring to call for statement. They arose out of the acts and practices of the carriers. The law condemns them as unlawful, imposes a penalty and gives (which is the feature with which we are now concerned) a right of action to any person injured. Many, if not the main, features of such a law must be administrative and remedial. In consequence the carriers were required to file schedules of the rates and regulations adopted; a Commission was constituted to determine the fairness of such rates and regulations; to annul them if unjust or discriminatory and formulate just regulations in their stead and modes of redress to the injured party were provided. It is to be observed that the carriers in the first instance may file and, indeed, are required to file schedules and regulations approved only by themselves. The responsibility, however, is imposed upon them to see to it that the regulations comply with the law. If they do, although loss results, there is no injury in the legal sense. If they do not the resulting damage becomes a legal injury for which a right of action is given. The remedies provided are

these: Any form of action, otherwise open to the injured party, is preserved to him. He is given the right to resort to an action at law or he may, at his option, ask the Commission to award him damages. If he brings his action at law it is necessarily based upon two propositions. One is that the regulation of which he complains is unlawful and the rule which he seeks to have established is the proper one. Whether this be a conclusion of law or a finding of fact is an academic distinction, but it must in fact appear. The other is the fact and amount of his damage. The first is an administrative question and for obvious reasons is committed to the Commission and to the Commission alone to find. The second is a juridical question which may be submitted to the courts or to any tribunal having the lawful power to determine it. The consequence follows that recourse to the Commission is only in part optional. The administrative questions must be first determined by the Commission because if an action were brought at law, without this first finding, the plaintiff could not make out his case. His real option is this. He may submit the administrative question alone to the Commission and thus having established his right to recover his damages may bring his action at law and prove both his injury and the amount of his damages or he may exercise the right given him by the statute by submitting both questions to the Commission. If he takes the first course, the action is one for damages and subject to well known rules. If he takes the second course (as these plaintiffs did) what results? Had the right of trial by jury not been involved Congress would doubtless have given the award of the Commission the effect of a judgment. The complainant, being a volunteer, is concluded by what the Commission does. The defendant is not concluded. If the defendant complies with the order the plaintiff is done. If the order is not complied with the plaintiff may have recourse to the courts (Federal or State), setting forth his in-

jury, the fact of his complaint to the Commission and the order made thereon and that it has not been complied with. In the words of the Statute, the cause then proceeds as an action for damages except that the findings of the Commission are made evidence, and the defendant must pay costs and counsel fees. If this language of the Statute is taken at its face value and the action regarded as one for damages, the whole proceeding is simplified. If the view now presented by the defendant is taken, a host of baffling queries rush upon the mind. The obstacles which shut out this view may be summed up in the observation that if such be the law the defendant is given the undeserved advantage of being in a position in which it may gain, but cannot lose, and all it risks in this speculation are costs and counsel fees. In this view the jury would be required to find under all the evidence (including the order), not the damages (up to the limit of the award), but how much of the damage found by the Commission is shown by the evidence of the defendant at the trial to have been improperly allowed. Without meaning it as a statement of defendant's position, the practical effect may be presented by this illustration. If the Commission found a loss in tonnage of 1000 tons and a money loss of $2.00 per ton, and a consequent damage of $2,000.00, the plaintiff would be bound by each of these findings, but the defendant would not. If the defendant showed at the trial that the money loss per ton was only $1.00, the jury must apply this to the 1000 tons found by the Commission and could not render a verdict for over $1,000.00, notwithstanding that it also further appeared at the trial that the Commission had made another mistake and that the true tonnage was 2000 tons and the actual damage $2,000.00. In other words, any mistakes made by the Commission against the defendant must be corrected by the jury, but mistakes made against the plaintiff cannot be corrected notwithstanding the fact that one may offset the other. This is inconsistent with the rulings in the cited cases and under them we do not feel at liberty to consider the question

an open one. The action is one for damages, the proceedings in which are *de novo* and in the nature of an appeal with the added consequences engrafted upon it by the Act of Congress. Whether the jury could award a larger sum in damages than the Commission allowed does not arise here. It might be conceded that under the Act of Congress the plaintiff was so limited without affecting the character of the action as one for damages. This disposes of practically all of the questions raised. A formal disposition is made of all of them in the order in which they are set forth in the reasons for a new trial.

(1) We do not think the verdict excessive. There was a substantial reduction from the sum awarded by the Commission. This, under the Act of Congress, would have been a supporting basis for a larger verdict. As the order is evidence it cannot be said the verdict has no support in the evidence.

(2-6) The proposition advanced in the points upon which are based reasons 2, 3, 4, 5, and 6, is that a partnership, which suffers injury, loses its right to recover (in whole or in part) if one of the partners dies. We think this proposition was properly negatived. The minor point made as to the interregnum from April to October was in effect waived and because of this, not answered. Under the facts of the case there was no justification for insistence upon it. To have submitted it to the jury would have merely been confusing. To obviate the necessity of instructions the trial Judge inquired of counsel whether there was any dispute over the dates as of which the damages were to be assessed. The reply was there was none. The main point was ruled against the defendant. It was invited, if not satisfied with the general answer, to ask for a specific answer to any point submitted. No answer was requested to this point. This waived the minor point and we do not recognize the right of defendant to now complain.

(7-13) The points referred to in reasons 7 to 13,

both inclusive, were answered in the general charge. Specific answers were waived by defendant. The point now made we understand to be that the charge was erroneous. Whether it was or not is determined by the correctness of the theory on which the case was submitted to the jury. The points submitted were affirmed except in so far as they required the jury to find not what the damage was (up to the limit of the award of the Commission) under all the evidence (including the award), but what the damage was under the findings of the Commission as corrected by the evidence submitted by the defendant. This has been sufficiently discussed. The points could not be affirmed categorically because they ignore the provision of the Act of Congress which makes the findings of the Commission (including the amount of the damages) evidence. They are as much evidence as are the items of which the damage is made up.

(13 and 14) Points 16 and 17 here referred to were affirmed.

(15) This point asked for binding instructions to the jury to find for the defendant. The point was negatived and we still think properly so.

(16) The 18th point was based upon nothing in the case and the Court was not asked to answer it. If it is meant to invoke the rule which pertains in Pennsylvania of the consequences of delay in payment due to an unconscionable demand the attention of the Court should have been directed to this feature. In these cases no such question was raised.

The remaining sixteen reasons are really duplications of those discussed (being stated separately in each case) except the sixteenth. This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: The testimony referred to was that of an intelligent and fair witness with a firm grasp of the facts to which he testified.

These were all book-keeping or mathematical facts as he had no knowledge except that derived from the figures submitted to him. The trial Judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose and it was forgotten. Counsel for defendant were in no way responsible for this lapse and their client should not suffer for it. Nevertheless the fact is they did not call attention to the oversight. Neither was it the fault of the plaintiffs and they are in no default and the loss should not fall on them.

The rule for a New Trial is discharged and plaintiff may enter judgment in each case on the verdict.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Session, 1912. No. 2422.

Action under I. C. C. Statutes.

JAMES H. MINDS, et al.,
vs.
PENNSYLVANIA RAILROAD COMPANY.

December Session 1912. No. 2424.

Action under I. C. C. Statutes.

BULAH COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

SUPPLEMENTAL OPINION.
Filed Nov. 8, 1916.

DICKINSON, *J.*

We have recalled the opinion in this case for the purpose of clarifying the statements made in the dis-

cussion of reasons 7 to 13 and reason 16. The charge was open to the averment of error in two respects. One was the answer to the points. The points presented the thought that as one of the findings of the Commission was as to the tonnage, and this finding had been answered by the testimony of the accountant witness, the jury were bound to accept the evidence for the defendant because the plaintiff was concluded by the finding, and further because the correcting evidence was all one way. The court refused to so rule and instructed them that neither side was concluded by any of the special findings of the Commission, and they were to determine the questions of fact from all the evidence before them, part of which was the finding of the Commission as to the amount of the damage.

The other error was the inadequacy of the charge in the respect that it presented to the jury the evidence of the amount finding of the Commission, but their attention was not called to the testimony of the witness for the defendant. In saying that the defendant had waived specific answers to the points referred to, we meant merely that the charge of the court was intended and accepted as an answer to these points, affirming them so far as the charge was in accord with them, and dis-affirming them otherwise. We did not mean to imply that counsel had abandoned in any degree the contention of the defendant.

With respect to the inadequacy of charge feature, all that is intended is that the failure of the trial judge to specifically call the attention of the jury to the testimony of the witness referred to was, as it has been stated to have been, an oversight. Had the attention of the trial judge been called to this, he would have supplied the omission. It was not meant to be said that counsel for defendant did not intend to call attention to this feature. All that is meant is that the trial judge did not so understand it. Intending to have discussed this feature, the trial judge, at the close of the charge,

thought he had discussed it, and it was not until after the charge had been transcribed that he discovered the omission. It was doubtless because of this that the request of counsel was not understood to refer to this omission in the charge.

MOTION FOR JUDGMENT UPON THE VERDICT.
Filed Nov. 10, 1916.

AND NOW, to wit: this Tenth day of November, 1916, it is moved that judgment upon the verdict in the above case be entered in favor of the plaintiff and against the defendant.

H. W. Moore,
John H. Minds,
Attorneys for Plaintiff.

JUDGMENT.
Filed Nov. 10, 1916.

Before Dickinson, *J.*

And now, to wit, this 10th day of November, 1916, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiff and against the defendant in the sum of Sixteen thousand ninety-two and 92-100 ($16,092.92) Dollars.

BY THE COURT,
Attest:
Leo A. Lilly,
Deputy Clerk.

OPINION.
Filed Nov. 10, 1916.

SUR MOTION FOR ALLOWANCE OF ATTORNEY'S FEE.

DICKINSON, *J.*

In the application made to the Court to fix the amount of the fee allowance under the provisions of the Interstate Commerce law applicable to this proceeding, the statement was made, with the concurrence of all the counsel, that the allowed fees were part of the damages and to be incorporated into the judgment rendered.

The provision of Section 16 of the Act of Congress as amended was at the time in the mind of the Court but a copy of the Act was not then in hand for verification of this recollection. That provision is "if the petitioner shall prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit". This is the only pertinent provision we have been able to find. If the allowance of counsel fees has no other basis than this Section, then, as observed at bar, we see no need to fix the amount at this time. If counsel concur in this view, the application and the present finding may be withdrawn. We have no objections, however, to determining the question now, if it is desired that this be now done. Counsel have joined in asking this, and further for the filing of a memorandum expressing the views of the Court and the principles guiding it in making the allowance.

It has been ruled that the Act provides only for counsel fees in the proceeding at law, and that no allowance can be made for services rendered before the Interstate Commerce Commission. We have, therefore, restricted the allowance by excluding all proceedings before those begun in this Court.

In considering, however, the question of counsel fees and their reasonableness and the time of counsel necessarily consumed, we do not, because we cannot,

shut our eyes to the fact which is in this record that this case was the subject of investigation before the Commission. This fact we think does enter among the considerations involved in the question of reasonable fees. It is not that they should be allowed now for these past services because this should not be done and is not done. The analogue which suggests itself is presented by two supposititious cases. They have in common the necessity for the employment of counsel. They have further in common that a reasonable charge would be governed by the skill, the labor, the time, the responsibility, and as an element also the fruits of the litigation. In one case the petitioner might employ the services of counsel who had nothing whatever to do with the investigation by the Commission nor with the litigation before it. Because of their lack of information they would be required to inform themselves of all the fact features in order that they might properly prepare the case for trial. An inquiry into what had already been done before the Commission and access to the fruits of the labors of counsel then engaged would appreciably decrease the labor which otherwise would have been required of them, and would thus call for a less fee for services than if they had been under the necessity of making an original investigation into all the facts bearing upon the case and had not had the aid of the labors of their predecessors in the field. The allowance of counsel fees would in consequence have been fixed with the fact of such previous litigation in mind, but the allowance would have included the services of counsel in the necessary preparation of the case for trial. The same petitioner might secure as his counsel, for the purposes of the present proceeding, the same counsel who had been engaged in the hearings before the Commission. It might be and doubtless would be, at least to some extent, true that the labors of such counsel and the actual time devoted to the case by them would be less than what would have been had they not previously been connected with the case, but

there would have been, because of their familiarity with all features of the case, a probable increase of skill in its conduct, and skill enters as an element in the compensation as well as time. We, therefore, cannot see the soundness of the proposition that counsel in the latter case would not be entitled to at least as much compensation as in the first case, and, on the other hand, we can understand that because of their familiarity with all phases of the litigation and because their previous experience had peculiarly equipped them to deal with the questions involved that their services would command a higher compensation. Compensation for professional services is of necessity most difficult of admeasurement. Perhaps as fair a method or rule of charge as could be adopted by counsel would be to charge in the nature of per diem allowance for all the time of counsel really called for to be devoted to the case, and to charge a like, fair and reasonable percentage of the amount recovered as meeting the due of the skill and responsibility called for.

Having all these considerations in mind, we, in the language of the Act, allow to the plaintiffs the sum of Three Thousand Two Hundred and Fifty Dollars ($3250.00) as a reasonable attorney's fee, and hereby tax as part of the costs of the suit, and to be collected as such, an attorney's fee at that sum.

An exception is allowed to defendant.

BY THE COURT,

DICKINSON, *J.*

PETITION FOR WRIT OF ERROR.
Filed Nov. 14, 1916.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

And now, November 14, 1916, comes The Pennsylvania Railroad Company, defendant herein, and says

that on or about the 10th day of November, 1916, the said court entered judgment in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of, and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Defendant.
H. W. S.

ORDER ALLOWING WRIT OF ERROR.
Filed Nov. 14, 1916.

Before DICKINSON, *J.*

And now, November 14th, 1916, upon motion of Henry Wolf Bikle and Francis I. Gowen, attorneys for the defendant, and upon filing a Petition for a Writ of Error and Assignment of Errors, it is ordered that a Writ of Error be, and it is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit, the judgment heretofore entered herein, and the amount of bond on said Writ of Error be, and is hereby, fixed in the sum of $32,185.84.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

ASSIGNMENTS OF ERROR.
Filed Nov. 14, 1916.

And now, The Pennsylvania Railroad Company, defendant in this cause, files with its petition for a writ of error, the following assignments of error, upon which it will rely upon its appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause.

I.

The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment.

II.

The learned trial Judge erred in charging the jury as follows:

> "Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out

at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

"Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123 that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that

there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

111.

The learned trial Judge erred in charging the jury as follows:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you

add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest."

IV.

The learned trial Judge erred in refusing to affirm the first point submitted by the defendant, as follows:

"1. The present action is brought by the surviving and liquidating partner of a partnership to recover the amount of an award by the Interstate Commerce Commission in a proceeding instituted before that body after the dissolution of the partnership by the plaintiff as such surviving and liquidating partner to recover damages claimed to have been sustained by the partnership, due to alleged unjust discrimination prohibited by the Interstate Commerce Act, to which it had been subjected by the defendant. The cause of action asserted before the Commission did not survive the dissolution of the partnership, and consequently was not legally maintainable after such dissolution, and the plaintiff cannot consequently recover in the present action."

V.

The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, as follows:

"2. In the proceeding brought before the Interstate Commerce Commission, the plaintiff in the present action was not entitled, as surviving or liquidating partner of the partnership formerly existing between himself and William J. Matz, to recover damages on account of any injury which may have been sustained by William J. Matz, as such partner because of the alleged unlawful dis-

crimination complained of in that proceeding, and the award, therefore, made by the Interstate Commerce Commission in favor of the plaintiff, as surviving and liquidating partner of the said partnership, was invalid, in so far as it directed payment to be made to the plaintiff of damages on account of injuries sustained by the said William J. Matz as such partner."

VI.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

"3. It appears that the partnership existing between James H. Minds and William J. Matz, trading as the Bulah Coal Company, was dissolved by the death on April 12th, 1904, of William J. Matz, and that subsequently, to wit, on October 5th, 1904, an agreement of partnership was entered into between the said James H. Minds and Julia A. Matz, which by its terms was to date from April 12th, 1904. Any cause of action, therefore, that James H. Minds could assert as surviving or liquidating partner of the partnership composed of himself and William J. Matz, to recover damages claimed in the proceeding before the Interstate Commerce Commission, was necessarily confined to the period antedating April 12th, 1904."

VII.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

"4. It appears that the award of the Interstate Commerce Commission which forms the basis of the present action covered a period extending beyond April 12th, 1904, and down to October 1st, 1904. The award, therefore, covers a period of time in which damages were not recoverable by the

complainant in the proceeding before the Interstate Commerce Commission, and the award, therefore, was invalid, and the amount thereof is not recoverable in the present action."

VIII.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"5. There is no evidence which would justify the jury in determining how much of the award made by the Interstate Commerce Commission is properly referable to the period prior to April 12th, 1904, and in the absence of evidence on this point the jury cannot guess at the amount which is referable, and cannot, therefore, in the present action render a verdict for the plaintiffs for more than nominal damages."

IX.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of min-

ing the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages."

X.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons."

XI.

The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

"16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made."

XII.

The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

"17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made."

XIII.

The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence, the plaintiffs are not entitled to recover and your verdict should be for the defendant."

XIV.

The learned trial Judge erred in entering judgment in favor of the plaintiff and against the defendant upon the verdict of the jury.

XV.

The learned trial Judge erred in allowing a counsel fee of $3250.00, since such counsel fee was excessive.

XVI.

The learned trial Judge erred in allowing a counsel fee of $3250.00, since such fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court.

XVII.

The learned trial Judge erred in allowing a counsel fee of $3250.00, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court.

Henry Wolf Bikle,
Francis I. Gowen,
Attorneys for Defendant.
H. W. S.

PRAECIPE SUR TRANSCRIPT.
Filed Nov. 14, 1916.

To the Clerk of United States District Court, Eastern District of Pennsylvania:

In making up the transcript of record in the above entitled case you are to include the following:

Docket entries,
Writ of error,
Petition,
Demurrer to Petition,
Order overruling Demurrer,
Plea,
Petition to Amend Original Petition,
Answer sur Petition for leave to amend Petition,
Order of Court granting leave to amend original Petition,
Pleas to Amended Petition,
Bill of Exceptions,
Opinion Dickinison, J., sur motion for new trial,
Supplemental Opinion sur motion for new trial,
Motion for judgment,
Judgment,
Opinion sur counsel fees,
Petition for allowance of writ of error,
Assignments of error,
Clerk's certificate,

and no others.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Plaintiffs in Error.
H. W. S.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company vs. Pennsylvania Railroad Company, No. 2422, December Sessions, 1912, as per praecipe of counsel filed, a copy of which is hereto annexed the transcript of record is to include and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia,
(Seal) this 21st day of November, in the year of our Lord one thousand, nine hundred and sixteen and in the one hundred and forty-first year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194 (List No. 16).

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as Bulah Coal Company, Defendant in Error.

And afterwards, to wit, on the 30th day of April, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 19th day of July, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS, Surviving Partner, &c., Lately Trading as Bulah Coal Co., Plaintiff Below.

March Term, 1917.

No. 2195.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS and JULIA A. MATZ, Trading as Bulah Coal Co., Plaintiffs Below.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, McPherson, and Woolley, Circuit Judges.

MCPHERSON, *Circuit Judge:*

In these cases the plaintiffs filed petitions in the district court to enforce orders of reparation made by the Interstate Commerce Com-

mission (23 I. C. C. 192); the orders being based on the Railroad's discrimination against the Bulah Coal Co. in the distribution of cars; 20 I. C. C. 52. Two periods are involved, one (No. 2194), from July 1, 1902, to October 1, 1904, and the second (No. 2195), from Oct. 1, 1904, to June 30, 1907. The cases were tried together, but separate verdicts and judgments were entered, in No. 2194 for $16,092.92, and in No. 2195 for $33,617.37.

During the first period James H. Minds and William J. Matz, a partnership known as the Bulah Coal Co., leased and operated a bituminous coal mine known as Webster No. 4, situated on the Tyrone Division of the Railroad's system in the Clearfield district of Pennsylvania. The mine had no other outlet to market. Matz died in April, 1904, and Minds continued the operation as surviving partner until October 1. On that date, a new partnership bearing the same name, composed of Minds and Julia A. Matz, the widow, executrix, and sole legatee of William J. Matz, took over the mine and went on with the business until June 30, 1907. During the 5 years in question, whenever the Railroad's available supply of cars was not large enough to carry the aggregate production of the district, the cars were allotted to the mines on a percentage basis, this percentage being determined in accordance with the Railroad's rule.

The Coal Co. objected to the rule as unfair and discriminatory, and in June 1907 attacked it before the Commission. Two proceedings were brought, the first by Minds as surviving partner, covering the first period: the claim was for about $80,000 damages, and in March 1912 a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Co., and covered the second period; the claim was for about $75,000 damages and the order, also entered in March 1912, was for about $31,700, with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that Minds as surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Mtaz sued on the order entered in favor of Minds as surviving partner. This was an obvious blunder, and on April 10, 1916, the district court allowed the orders to be transposed, the Railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders. As we understand, however, this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the district court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury.

In passing on the Coal Co.'s complaints, the Commission decided that the Railroad's rule was wrong, and had resulted in discrimination; and then announced the correct rule, which showed that the Coal Co. had not received its proper quota. The Railroad contends that the Commission has not disclosed the basis on which the rule rests, but has merely stated in effect that the Coal Co. could, and would, have mined and shipped certain additional tonnage, if its

share of cars had been received. This contention is not correct, as a reading of the Commission's full reports on this subject will show; Ohio R. R. Com. v. Hocking Valley Ry., 12 I. C. C. 398; Traer v. Chic. & Alt. R. R., 13 I. C. C. 451; Hillsdale Co. vs. Pa. R. R., 19 I. C. C. 356; Minds vs. Pa. R. R., 20 I. C. C. 52.

The basis of the Commission's orders is certain findings of fact concerning the capacity at which the mine should be rated; the number of working days that should constitute an average working month; the number of additional tons that the Coal Co. could and would have mined, sold, and shipped, during the whole 5 years, if the mine had received its proper share of cars; the amount of profit that would have been made on the estimated additional tonnage; the actual cost of mining per ton; and the estimated cost if the mine had received its proper share of cars. In the district court, the Coal Co. offered the evidence of several witnesses in addition to the findings and orders. The Railroad did not, and does not, dispute the findings except in two particulars; (*a*) It denies that the Coal Co. could have mined coal at a cost of 88 cents per ton, even if the proper share of cars had been furnished; and (*b*) It disputes the estimate of additional tonnage that the Coal Co. would have mined and shipped during the second period, if such share had been received.

As to the first particular, the Railroad insists, that the Coal Co. could not possibly escape two items of cost, namely, the mine rate of wages and the royalty, and that, even if nothing else than these items were charged against the additional tonnage, the cost of mining both the coal that was actually brought to the surface, and the estimated additional coal, would necessarily have been more than 88 cents, the cost found by the Commission. And, in further reference to the cost of mining during the second period, the Railroad insists that the inevitable cost would have embraced two other items in addition to the mine rate of wages and the royalty. To the Railroad's evidence concerning this first particular, the Coal Co. offered some evidence in reply, and thereupon the Railroad asked for instructions whose refusal is assigned for error.

The other particular referred to relates to the second period only. The Railroad contends, that when the Commission estimated the additional tonnage that could and would have been mined and shipped if the Coal Co. had received its proper share of cars, they disregarded their own rule of distribution. This contention bears directly upon the present controversy, because the amount of the Coal Co.'s damage depends largely on the number of cars it should have received. It would have made profits if it had been able to ship, and it could have shipped if it had received the cars, so that the Railroad's failure to furnish the cars bears directly on the question of damage. The Railroad's argument is, that in substance the Commission's rule provides as follows; The capacity of each mine in the district is to be rated by adding the tons it could produce (its physical capacity), and the average number of tons it could sell (its commercial capacity), and dividing the sum by two—the capacity or rating thus ascertained being the basis on which cars are to be apportioned during percentage periods. The first step in

determining the number of cars to be allotted to each mine during such periods is to determine the proportion that would normally go to the mine. This is obtained by taking the aggregate ratings of all the mines in the district and fixing the proportion that each rating bears to the aggregate. The next step is to determine how many cars are available, and in so doing all the cars in the four classes described below are to be put into one pool. Whenever there are cars enough to carry all the coal produced, no question of diminishing the number for each mine arises; but during percentage periods the question does arise continually, for under the Commission's rule the three classes of "assigned" cars must first be allotted to the mines that have a prior right thereto, and this allotment inevitably compels a readjustment of the "unassigned" or "system" cars that each mine is to receive. There are 4 classes of coal cars; (1) individual or private cars, owned or leased by a shipper, (2) cars intended to carry fuel for the Penna. Railroad itself, (3) cars sent by foreign railroads intended to carry their own fuel supply, and (4) other cars furnished by the Railroad for general commercial use. The first three classes are "assigned" cars, and the cars in the fourth class are "unassigned" or "system" cars. The rule requires that the assigned cars shall first be given to such mines as may be designated either by the owners or lessees of the private cars, or by the respective railroads; and requires that these 3 classes shall be thus allotted in the first instance, without regarding the number of cars to which the particular mine might be entitled if its rating alone were considered—the result being,—that when the system cars come to be distributed, they cannot be properly allotted without first taking into account the previous allotment of the assigned cars. For example; if a mine has already received assigned cars, these must be counted against the share to which its rating (if taken alone) would entitle it, so that, if the assigned cars already received equal or exceed the mine's share estimated according to its rating alone, it receives none of the system cars; while on the other hand, if the assigned cars already received are fewer than its rating (if considered alone) would entitle it to receive, the mine does receive some of the system cars, but only so many as will bring the total number up to the rating. On this point, the Railroad contends, that the Commission undoubtedly disregarded its own rule in estimating the additional tonnage that would have been mined and shipped by the Coal Co. during the second period, and has ascertained such tonnage by a different and incorrect method.

The Railroad complains also about the damages recovered as interest by the plaintiffs, its position being this: Minds as surviving partner claimed about $80,000, and was awarded only about $18,600; Minds and Julia Matz claimed about $75,000, and were awarded only about $31,700; each sum to bear interest from June 28, 1907. The Railroad objects to the Commission's allowance of interest, and also to any allowance of interest in the district court, on the ground that the findings and orders of the Commission and the evidence offered at the trial show clearly that the plaintiff's demands were grossly and unfairly inflated.

Finally, after the trial, counsel fees were asked for and allowed; and these are now objected to as excessive, and also as without legal warrant, the second objection being put on the ground that the fees should have been confined to the services of counsel in connection with the suits in the district court.

(1) The Railroad complains, but we think without sufficient warrant, that the trial judge erred in what he said to the jury in submitting the question, how much the cost of mining would have been if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the Railroad was not entitled to binding instructions. The verdict on this point must be accepted as final.

(2) The next matter concerns the second period only, and presents the objection on which the Railroad seems to lay most weight, namely, that in making the orders of reparation the Commission followed, not its own, but another, rule of distribution. In this respect the Railroad contends that the situation is very much like the situation in Railroad vs. Jacoby, 242 U. S. —, and indeed is controlled by that decision. In our opinion, an important difference exists for the following reasons:

Before the Commission the Jacoby case and the case now in hand were considered in the same group, and both cases attacked the Railroad's rule of distribution on the ground of discrimination. When the Jacoby case came to be tried in the district court, the plaintiff offered no other evidence than the Commission's order, whereupon the Railroad offered tables showing in detail that during the period then in question certain favored companies had received cars amounting to 59.9 and 59.6 per cent of their ratings. Jacoby had received a much smaller percentage, and the relevancy of the tables was, not so much to prove the discrimination as to show in connection with other evidence that the Commission had calculated Jacoby's damages by using precisely the same percentages, and had thus permitted recovery (as the Supreme Court said)—

"* * * not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that (Jacoby was) entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of the enforcement of such rule, would be, not to give the shipper the damage which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the act of Congress."

In the district court Jacoby recovered the amount thus improperly awarded by the Commission, with interest thereon, and the Supreme Court held that such a result was wrong; and that the jury should have been instructed, that, if the Commission's award was in fact based on the proposition that Jacoby also was entitled to cars

amounting to 59.9 and 59.6 per cent, the award was erroneous and the plaintiff should not have recovered. The supreme court said:

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentage, shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the Commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiff's damage. As an award by the Commission is only prima facie evidence of the amount of damage, it follows that on the trial in the district court the Railroad may attack the amount, and if the evidence show that the award is incorrect the jury should follow the evidence and reject the award. We do not decide the question, whether a plaintiff can recover more than the Commission awards, but undoubtedly the Railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the Commission, and it seems to us, therefore, that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result.

We have considered the Railroad's position at some length in order to present it to the Supreme Court if the case should be reviewed by that tribunal, but in our opinion the question is not before us on this record for the following reason: The district judge gave to the jury a clear and painstaking explanation of the questions submitted, and in general terms he instructed them about the proper method of distributing cars; but, no doubt by inadvertence (as he himself

has stated in 237 Fed. on page 272), he did not call their attention in detail to some of the evidence, particularly to a table or blue print that was regarded by the Railroad as of much importance. Some of the Railroad's requests for charge were based on this table, and indeed the argument of counsel in this court rested in large measure thereon. At the end of the charge the trial judge said:

"I think I have gone over the subject-matter of all of the different points submitted to me. So far as they are affirmed in the general charge they are affirmed, and so far as not affirmed in the general charge they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered."

This was a plain request to counsel to call his attention to any omission, and in fairness to him should have been then complied with. But he was not asked to answer specifically any of the Railroad's points. On the contrary, counsel replied as follows:

"In the first period we do not dispute the lost tonnage nor the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the court so charge."

The court immediately complied with this request, whereupon each party sent out its own claculation of the amount due in order to save the jury from labor. As it seems to us, the Railroad should not now be allowed to complain, as it does complain by several assignments of error, that some of its requests for instruction were not given. The situation is dealt with so well in Thompson v. Lumber Co., 55 Pa. Super, 327, that we content ourselves by repeating what was said in that case by President Judge Rice:

"The charge as a whole was a clear, comprehensive, and impartial presentation of the issues of fact to be decided, and if there was omission to call attention to, or comment upon as fully as might be deemed desirable, specific facts or phases of the evidence, it was an inadvertency, which, if the judge's attention had been called to it, doubtless would have been corrected. The decisions are numerous, and are founded on just principles essential to the avoidance of undue expense and delay in the adjudication of cases, that inadvertent mistakes or omissions in reviewing the testimony should be called to the attention of the court before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. As to such inadvertent omission or mistake, it has been said, and we think the principle is applicable to these assignments, that "a party may not sit silent and take his chance of a verdict, and then if it is adverse complain of a matter which, if an error, would have been immediately rectified and made harmless:" Com. v. Razmus, 210 Pa. 609; Com. v. Minney, 213 Pa. 149; Medis v. Bentley, 216 Pa. 324; Slavin v. Northern Cambria Street Railway Co., 47 Pa., Superior Ct. 454; Com. v. Eaby, 52 Superior Ct. 619."

(3) With regard to the allowance of damages for delay in the form of interest, we find no error to correct. Altho such an allowance in actions of tort is not a matter of right, it is nevertheless permissible and often forms part of a verdict. On the facts of this case we cannot say that no allowance should have been made: the only ground of

the objection is the difference between the amount originally claimed before the Commission and the amount finally adjudged to be due, and this difference is not of itself sufficient to require us to decide as a matter of law that the plaintiff's original claims were unduly inflated or made in bad faith. Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict.

(4) As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial judge that he confined himself to compensation for services in the district court, and, as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award.

In each case the judgment is affirmed.

Endorsed: No. 2194. Opinion of the Court by McPherson, J. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194 (List No. 16).

PENNA. RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, July 19, 1917.

Endorsed: No. 2194. Order Affirming Judgment. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

And afterwards, to wit, on the seventeenth day of September, 1917, a petition for re-argument or modification of the Court's opinion was duly filed, whereupon the Court made the following order:

And now, to wit, October 8, 1917, after due consideration, the petition for re-argument or modification of the court's opinion in the above-entitled case is hereby refused.

(Signed) PER CURIAM.

Received and filed Oct. 8, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as Bulah Coal Company, Defendant in Error.

Specifications of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the plaintiff in error, The Pennsylvania Railroad Company, by Henry Wolf Bikle and Francis I. Gowen, its Attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for sixteen thousand ninety-two Dollars and ninety-two cents ($16,092.92), and costs of suit, entered

on the 10th day of November, A. D. 1916, in favor of said defendant in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error in the said cause, which assignment was as follows:

"I. The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:

II. The learned trial Judge erred in charging the jury as follows:—

"Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

"Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123 that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for

each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregate of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomena. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:

III. The learned trial judge erred in charging the jury as follows:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent interest."

6. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:

IX. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior

to April 1st, 1903, and 63 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6,952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages."

7. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:

X. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons."

8. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:

XI. The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

"16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made."

9. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:

XII. The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

"17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made."

10. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:

XIII. The learned trial judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence, the plaintiffs are not entitled to recover and your verdict should be for the defendant."

11. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:

XIV. The learned trial Judge erred in entering judgment in favor

of the plaintiffs and against the defendant upon the verdict of the jury.

12. The said Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:

XV. The learned trial Judge erred in allowing a counsel fee of $3,250, since such counsel fee was excessive.

13. The said Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:

XVI. The learned trial judge erred in allowing a counsel fee of $3,250, since such fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court.

14. The said Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:

XVII. The learned trial Judge erred in allowing a counsel fee of $3,250, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court.

Wherefore, the said, The Pennsylvania Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Pennsylvania, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by the Supreme Court, to the end that justice may be done in the premises.

THE PENNSYLVANIA RAILROAD COMPANY,
By HENRY WOLF BIKLÉ,
FRANCIS I. GOWEN,
Attorneys for Plaintiff in Error.

October 11th, 1917.

Endorsed: No. 2194. Specifications of Error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as Bulah Coal Company, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, The Pennsylvania Railroad Company, Plaintiff in Error, in the above entitled cause, respectfully shows that the above entitled cause is now pending in this Court, and that a judgment has therein been rendered on the 19th day of July, A. D. 1917, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of the defendant in error and against the plaintiff in error, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and it is not an admiralty case, but that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of this Court to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the specification of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By HENRY WOLF BIKLÉ,
FRANCIS I. GOWEN,
Its Attorneys.

H. W. B.

October 11, 1917.

Endorsed: No. 2194. Petition for writ of error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of $250.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

October 16, 1917.

Endorsed: No. 2194. Order Allowing Writ of Error. Received and filed October 16, 1917. Saunders Lewis, Jr., Clerk.

Bond.

Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and United States Guarantee Company, as sureties, are held and firmly bound unto James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, hereinafter called the Obligee, in the full and just sum of Two hundred and fifty dollars ($250.) to be paid to the said James H. Minds surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said court between the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, and The Pennsylvania Railroad Company, a judgment was rendered against the said The Pennsylvania Railroad Company and in favor of the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company in the sum of $16,092.92, which judgment was on appeal to the United States Circuit Court of Appeals for the Third Circuit affirmed on the 19th day of July, 1917, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days.

Now the condition of the above obligation is such, That if the said the Pennsylvania Railroad Company, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

THE PENNSYLVANIA RAILROAD COMPANY,
(Seal of the Company.)
By W. H. MYERS, [SEAL.]
Vice President.

HENRY WOLF BIKLÉ,
Witness as to P. R. R. Co.

Attest:
ROB'T R. GROFF, [SEAL.]
Ass't Secretary.

UNITED STATES GUARANTEE COMPANY. [SEAL.]
(Seal of the Company.)
WILLIAM H. JACKSON,
Att'y in Fact.
EDWARD H. DE BAECKE,
Att'y in Fact.

A. THOMPSON,
Witness as to Surety.

Endorsed: No. 2195. Bond on Writ of Error for Supreme Court. Received and filed Oct. 18, 1917. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Pennsylvania Railroad Company, Plaintiff in Error, vs. James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third day of October in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Pennsylvania Railroad Company, and James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by

JOHN B. McPHERSON,
Circuit Judge.

UNITED STATES OF AMERICA, *ss:*

To James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the Pennsylvania Railroad Co. is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there

be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

JOHN B. McPHERSON,
Circuit Judge.

Service of this citation is accepted on behalf of the defendant in error.

H. W. MOORE,
Counsel for Defendant in Error.

October 19th, 1917.

Endorsed on cover: File No. 26,215. U. S. Circuit Court Appeals, 3d Circuit. Term No. 748. Pennsylvania Railroad Company, plaintiff in error, vs. James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company. Filed October 26th, 1917. File No. 26,215.